

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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 3. Appointed Chief to replace Robert L. Warren who retired 31 December 1985.
 4. Retired 31 December 1985.
 5. Appointed Chief 1 January 1986 to replace William Marion Styles who retired 30 December 1985.
 6. Appointed 7 February 1986.

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Haney v. Alexander	71 N.C. App. 731	Denied, 313 N.C. 329
Heatherly v. Montgomery Components, Inc.	71 N.C. App. 377	Denied, 313 N.C. 329
Heiser v. Heiser	71 N.C. App. 223	Denied, 313 N.C. 329 Appeal Dismissed
Helms v. Griffin	71 N.C. App. 638	Denied, 313 N.C. 601
Hicks v. NC Dept. of Corrections	71 N.C. App. 638	Denied, 313 N.C. 601
Higdon v. Davis	71 N.C. App. 640	Allowed, 313 N.C. 507
Hobson Construction Co. v. Great American Ins. Co.	71 N.C. App. 586	Denied, 313 N.C. 329
Ingle v. Allen	71 N.C. App. 20	Denied, 313 N.C. 508
International Minerals v. Matthews	71 N.C. App. 209	Denied, 313 N.C. 330
Jackson v. Bumgardner	71 N.C. App. 107	Allowed, 312 N.C. 797 Appeal Dismissed

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Johnston v. Gaston County	71 N.C. App. 707	Denied, 313 N.C. 508
Joyner v. J. P. Stevens and Co.	71 N.C. App. 625	Denied, 313 N.C. 330
Lauri Ann Lynch	71 N.C. App. 226	Denied, 312 N.C. 622
Lowder v. All Star Mills	71 N.C. App. 809	Denied, 313 N.C. 509
Miller v. Davis	71 N.C. App. 200	Denied, 313 N.C. 331
Sawyer v. Carter	71 N.C. App. 556	Denied, 313 N.C. 509
Smith v. Smith	71 N.C. App. 242	Allowed, 313 N.C. 174
Smith v. Watson	71 N.C. App. 351	Denied, 313 N.C. 509
Southern Utilities, Inc. v. Mandel Machinery Corp.	71 N.C. App. 188	Denied, 313 N.C. 510
Stanley v. Nationwide Mut. Ins. Co.	71 N.C. App. 266	Denied, 313 N.C. 174
State v. Allen	71 N.C. App. 458	Denied, 313 N.C. 605
State v. Baize	71 N.C. App. 521	Denied, 313 N.C. 174
State v. Bowens	71 N.C. App. 226	Denied, 312 N.C. 798
State v. Brown	71 N.C. App. 458	Denied, 313 N.C. 331
State v. Burch	71 N.C. App. 458	Denied, 314 N.C. 332
State v. Cameron	71 N.C. App. 776	Denied, 313 N.C. 510
State v. Deans	71 N.C. App. 227	Denied, 313 N.C. 332
State v. Ford	71 N.C. App. 748	Denied, 313 N.C. 511 Appeal Dismissed
State v. Gilchrist	71 N.C. App. 180	Denied, 313 N.C. 332
State v. Goodman	71 N.C. App. 343	Denied, 313 N.C. 333
State v. Harper	56 N.C. App. 643	Denied, 315 N.C. 393
State v. Hawkins	71 N.C. App. 809	Denied, 313 N.C. 333
State v. Huggins	71 N.C. App. 63	Denied, 313 N.C. 333
State v. Hunter	71 N.C. App. 602	Allowed, 313 N.C. 607
State v. Johnson	71 N.C. App. 607	Denied, 313 N.C. 511
State v. Jones	71 N.C. App. 226	Denied, 313 N.C. 333
State v. McLamb	71 N.C. App. 220	Allowed, 313 N.C. 334
State v. McLeod	71 N.C. App. 226	Denied, 313 N.C. 512
State v. Moore	71 N.C. App. 639	Denied, 313 N.C. 512
State v. Reber	71 N.C. App. 256	Denied, 313 N.C. 335

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Scott	71 N.C. App. 570	Denied as to additional issues, 313 N.C. 176
State v. Shiver	70 N.C. App. 496	Denied, 314 N.C. 674
State v. Southern	71 N.C. App. 563	Allowed, 313 N.C. 335
State v. Wallace	71 N.C. App. 681	Denied, 313 N.C. 611
State v. Walter	71 N.C. App. 226	Denied, 313 N.C. 335
State v. Washington	71 N.C. App. 767	Denied, 315 N.C. 396
State ex rel. Edmisten v. Challenge, Inc.	71 N.C. App. 575	Denied, 313 N.C. 336
State ex rel. Grimsley v. West Lake Dev., Inc.	71 N.C. App. 779	Denied, 313 N.C. 514
The Little Red School House, Ltd. v. City of Greensboro	71 N.C. App. 332	Denied, 313 N.C. 514 Appeal Dismissed
Town of Nags Head v. Tillett	71 N.C. App. 639	Allowed, 313 N.C. 515
Warmack v. Cooke	71 N.C. App. 548	Denied, 313 N.C. 515
White Oak Properties v. Town of Carrboro	71 N.C. App. 360	Denied, 314 N.C. 336
Winslow v. Jolliff	71 N.C. App. 459	Denied, 313 N.C. 176

CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

STATE OF NORTH CAROLINA v. DAVID MICHAEL REILLY

No. 8324SC1303

(Filed 6 November 1984)

1. Criminal Law § 163— issue of plain error—motion to suspend rules not required

No motion to suspend the rules is required in order to raise the issue of plain error in the brief, but the brief must specifically and not obliquely raise the issue.

2. Criminal Law § 60.5— breaking or entering and larceny—sufficiency of fingerprint evidence

The State's fingerprint evidence was sufficient to support conviction of defendant for breaking or entering of a restaurant and larceny of property therefrom where it tended to show: the restaurant's locked safe was broken open and money was taken therefrom; an employee time clock was broken, a cigarette vending machine was destroyed, and the premises were generally vandalized; defendant's fingerprints were found on the inside of the cigarette machine; the prints had been placed on the machine within 48 hours and would have begun to deteriorate after 60 hours; defendant, a former employee of the restaurant, had been fired for missing work and had not worked there for ten days prior to the crimes; defendant stated at the time of his arrest that his fingerprints could not have been on the machine because he didn't smoke or use matches; and although defendant testified that he had placed his hand in the machine and removed matches therefrom while he was employed at the restaurant, there was no evidence of a specific time or occurrence when defendant's fingerprints could have been lawfully impressed on the machine.

3. Criminal Law §§ 60.5, 163.3— failure to instruct on fingerprint evidence—no plain error

The trial court did not commit plain error in failing to give an unrequested special instruction on fingerprint evidence since fingerprint evidence

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concerned a subordinate feature of the case, and the absence of such instruction had no probable impact in the jury finding of guilt.

4. Constitutional Law § 48— failure to request instruction on fingerprints—no ineffective assistance of counsel

The failure of defendant's trial counsel to submit a request for jury instructions on fingerprints, a subordinate feature, was not ineffective assistance of counsel.

5. Criminal Law § 89.6— impeachment of alibi witnesses—religious beliefs and affiliations

Where a showing of a special relationship between defendant and his alibi witnesses through their membership in a religious group called The Way International formed a part of the defense of alibi, the trial court properly allowed the State to impeach the credibility of the alibi witnesses by cross-examination of the witnesses concerning their religious beliefs and affiliations. Furthermore, the father of one alibi witness was properly permitted to impeach the credibility of the witness by testifying that the witness had told him that she was not with defendant on the night in question but would testify for defendant because she believed he was innocent based upon her personal relationship with defendant in The Way.

Judge EAGLES dissenting.

APPEAL by defendant from *Friday, Judge*. Judgment entered on 15 April 1983 in Superior Court, WATAUGA County. Heard in the Court of Appeals 19 September 1984.

Attorney General Rufus L. Edmisten by Associate Attorney Newton G. Pritchett, Jr., for the State.

Scott E. Jarvis for defendant appellant.

BRASWELL, Judge.

Fingerprints have impressed themselves as the major theme of this case. Someone committed the crimes of Breaking or Entering and Larceny at Makotos Japanese Restaurant in Boone on 21 November 1982. By his direct appeal, we are called upon to review the sufficiency of the evidence to support the conviction of defendant David Michael Reilly as the perpetrator, to determine whether to apply the plain error rule to jury instructions regarding fingerprints, and to determine whether the State's impeachment of Reilly's witnesses on cross-examination was proper.

[1] In addition to these issues raised on direct appeal, Mr. Reilly, through two post-trial motions originally filed in this Court, has

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asked: (1) for a suspension of the rules so as to brief and argue the inadequacy of jury instructions on fingerprint evidence and (2) for a new trial by his motion for appropriate relief on the grounds that his trial counsel was ineffective. Given the record and full transcript as brought forward, we conclude that his motion for appropriate relief may be determined on the basis of the materials before us. No further evidence need be taken and no other proceedings need be conducted. See G.S. 15A-1418(b). With regard to the defendant's motion for a suspension of the appellate rules, we note that counsel argued plain error in his brief without waiting for any ruling on the motion. As we understand, *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and related cases which discuss plain error, no motion to suspend the rules is required in order to raise the issue of plain error in the brief, but the brief must specifically and not obliquely, raise the issue.

The second listed question in the defendant's brief, stated as a declarative sentence by appellate counsel, is as follows: "The trial court committed plain error by failing to properly instruct the jury on the law regarding fingerprint evidence." We perceive that a resolution of the subject of fingerprints will resolve all of the foregoing questions and motions without regard to the label affixed. To accomplish this we now summarize the "life of Reilly" leading to his arrest and jury conviction.

For a short time (8 September 1982 to 11 November 1982) Mr. Reilly was employed as a janitor at Makoto's Japanese Restaurant. When Reilly missed one day at work, he was discharged. The firing occurred on 11 November 1982. Mr. Reilly was last upon the premises on 19 November 1982 when he picked up his final check and performed the chore of taking out buckets of rainwater from a leaky roof, for which he was paid.

Mr. Reilly had moved to Boone in August 1982 from Massachusetts by way of New Knoxville, Ohio, in order to establish a fellowship of The Way International in Boone. While in Ohio he had met Pat Yacongis and Lee Metzger who also went to Boone and who were among the several witnesses for the defendant.

On the morning of 21 November 1982 the restaurant's previously locked safe was found at the bottom of the stairs, open, empty, and damaged, and with several thousand dollars in cash and charge slips missing. An employee time clock was broken, a

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cigarette vending machine was destroyed, and the premises were generally vandalized.

The cigarette machine stood at the bottom of the stairwell in an area partitioned for it. Mike Brandon, a co-assistant manager, testified that on his arrival the next morning he found the door to the cigarette machine hanging open, a few coins lying in the bottom of it, and the lock torn open so it could not be closed back. In describing what he saw at about 11:15 a.m. on the same day, Captain Arlie Isaacs of the Boone Police Department said that the "cigarette machine was, had been beaten open with the door standing open."

Captain Isaacs, an expert in lifting and comparing fingerprints with thirteen and one-half years' experience, made numerous lifts of latent fingerprints. Latent fingerprints taken from the damaged cigarette machine at 12:20 p.m., 21 November 1982, matched those of defendant Reilly, according to the testimony of Captain Isaacs and S.B.I. Special Agent Navarro, also a fingerprint expert. Captain Isaacs also testified that there were no similarities between the latent fingerprints identified as being made by Mr. Reilly and the fingerprints taken of other employees.

Captain Isaacs obtained impressions of the actual fingerprints of Mr. Reilly from him on 21 December 1982. Mr. Reilly was arrested on 31 December 1983. The Miranda warnings were fully given.

Since the defendant at trial contended that his fingerprints were lawfully placed on the machine, the following quote from Captain Isaacs' testimony was extremely incriminating:

He [defendant Reilly] stated that my fingerprints couldn't have been on the machine because I had no damn business around the machine, I don't smoke and I don't use matches.

Pinpointing the location of the fingerprints found on the cigarette machine was also crucial in this case. The machine was actually in the courtroom and observed by the jury. Captain Isaacs was asked: "Would you show the Jury where you found the prints, sir." After stepping down to the machine, Isaacs said:

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I first dusted the outer area of the machine, outer structure and not finding anything of value; *come down through the inside area of the cigarette machine, and dusted the, this portion here (pointing) which is obvious.* I lifted approximately four fingerprints of value from this side of the cigarette machine. (Emphasis added.)

On another occasion Isaacs said that the prints were "lifted from the metal portion of the inside of this machine over here." Other answers of Isaacs revealed that the prints he lifted would have been placed there within forty-eight hours and that "at the end of sixty hours then the print would begin to deteriorate." The lifted latent prints matched the defendant Reilly's right index, middle, and little fingers.

The defendant offered evidence. The defense was alibi. On that evening Reilly said he went bowling, visited with a friend, watched two movies on TV, returned home about 12:30 a.m., and went to bed. These events were corroborated by several witnesses.

The defendant argues that his fingerprints were affixed to the cigarette machine in a lawful manner and at a time other than the time of the crime. As janitor he had vacuumed under and around the machine. He testified that he was in the habit of inserting his hand into the machine's vending slot in order to obtain matches to light the wood stove located in his home. It was verified that the defendant had a wood stove.

The vending machine was so programmed that when someone purchased a pack of cigarettes the machine would also dispense a pack of matches if the purchaser pressed a separate button to obtain them. If the customer failed to press the button and take his matches from the slot, the next person [whether customer or stranger] to press the matches button would get free matches without making a purchase. Mr. Reilly was aware of this feature and said he used this knowledge to keep himself supplied with matches.

Mr. Randy Greer, owner of the cigarette machine, testified that the machine had "trips" that turn and "throws them [matches] straight down and hit here and they fall in the tray," which is the same tray that the cigarettes fall into. Both cigarettes and matches are removed by hand from the same tray.

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During his direct examination Mr. Reilly testified that he had pushed the matches button to the cigarette machine many times, and that he had touched the interior of the machine. When specifically asked, "Do you recall a specific time when you put your hand in the machine?", his response was, "No, I do not."

[2] Was this evidence sufficient to withstand a motion to dismiss or for nonsuit? Under the standard for our review reiterated in *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984), we hold that there was substantial evidence of each element of the offenses charged, that there was substantial evidence that the defendant was the perpetrator of the crimes, and that the motion to dismiss was properly denied. *State v. Bradley*, 65 N.C. App. 359, 309 S.E. 2d 510 (1983). Such contradictions and discrepancies, as championed by defendant, in the evidence were solely for resolution by the jury. As said in *Brown, Id.*,

It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980).

We also specifically hold that the evidence was sufficient to support a conviction on the use of Mr. Reilly's fingerprints found at the scene of the crime. In overruling nonsuit the trial court announced it based its ruling on the law in *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). In *Miller* the defendant was convicted of breaking, entering and larceny of a launderette, and the defendant's thumbprint was found on a vending machine lock. When questioned about the print the defendant denied he had ever been in the launderette.

We feel that the law on fingerprint evidence in relation to our scope of review is best summarized in *State v. Bass*, 303 N.C.

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267, 272, 278 S.E. 2d 209, 212-13 (1981) wherein the Supreme Court lists numerous cases, including *Miller, supra*, in which it has considered the sufficiency of fingerprint evidence to withstand dismissal. The developed rule establishes that

when the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed. As stated in *State v. Miller, supra*, and quoted in *State v. Scott*, [296 N.C. 519, 251 S.E. 2d 414 (1979)]:

These cases establish the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.

An analysis of our evidence when placed against the *Bass* rule establishes that there was unequivocal testimony by Captain Isaacs that Mr. Reilly's fingerprints were found at the scene of the crime, and through the testimony of both Isaacs and Agent Navarro, the crime scene fingerprints positively corresponded with Mr. Reilly's fingerprints. There was substantial evidence from which the jury could find that Mr. Reilly's fingerprints could only have been impressed on the cigarette machine at the time of and during the crime, as illustrated by these circumstances:

- (1) The prints were found and lifted from the inside of the machine.
- (2) The prints were "fresh," placed on the machine within approximately 24 to 48 hours, and would have begun to deteriorate after 60 hours.
- (3) The defendant had not been employed at the restaurant since 11 November 1982. The crime occurred during the

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night of 20/21 November 1982. There is no testimony that the defendant touched any part of the cigarette machine for any reason on 11 November 1982 or on the morning of 19 November 1982 when he picked up his last check and performed the chore of removing rainwater containers.

- (4) The defendant denied at the time of arrest: "[M]y fingerprints couldn't have been on the machine because I had no damn business around the machine, I don't smoke and I don't use matches."
- (5) There were no similarities between the latent prints identified as defendant's and the fingerprints taken from other employees.
- (6) There is a failure in the evidence to establish a specific time or occurrence when the defendant's fingerprints could have been lawfully impressed. [Q. "Do you recall a specific time when you put your hand in the machine?" A. "No, I do not."] There is no evidence specifically indicating that the defendant took matches from the machine or touched any part of the machine at any time prior to the crime itself, or before or after he was fired.

Furthermore, the defendant was a former employee fired for missing a day's work and the restaurant's employee time clock was one of the items vandalized. These circumstances, singly and collectively, logically tend to show that Mr. Reilly was present and participated in the crimes. Upon this evidence it fell within the province of the jury to determine credibility and to decide what the evidence proved or failed to prove.

Unlike in *Bass*, Mr. Reilly has offered no explanation for the "fresh" fingerprints found at the scene of the crime which, if true, would exculpate him. The defendant's explanation for the prints—that he must have at some time placed his hand in the machine and removed matches—was presented to the jury by his evidence, and was rejected, as lay within the jury's right. Contrary to the appellant's brief, our record and transcript do not say that the lifted latent fingerprints came from the inside of the metal tray that holds the matches as they are dispensed, and which tray is accessible to any stranger from the outside of the machine.

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[3] We now turn our attention to the question of whether "plain error" was committed when the trial court refused to give a special instruction on fingerprint evidence. We find no such error. Our result is the same conclusion reached by our Supreme Court in *State v. Odom, supra*, when it originated the rule in its discussion of the application of Rule 10(b)(2) of the Rules of Appellate Procedure concerning jury instructions. As of this writing we are unaware of any decision in our North Carolina Supreme Court which has found plain error to exist. By the *Odom* case all appellate courts were informed that plain error was to be applied only "in the exceptional case where, after reviewing the entire record, it can be said that the claimed error is a 'fundamental error.'" *Id.* at 660, 300 S.E. 2d at 378 (citation omitted). Plain error must fall within these areas:

- (1) a fundamental error, meaning "'something so basic, so prejudicial, so lacking in its elements that justice cannot be done.'" *Id.* or
- (2) a grave error, which must amount "'to a denial of a fundamental right of the accused,'" *Id.*, or
- (3) the error has "'resulted in a miscarriage of justice,'" *Id.*, or
- (4) an error that denies appellant of "'a fair trial,'" *Id.*, or
- (5) an error that "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *Id.*, or
- (6) "where it can be fairly said that 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'" *Id.*

There were no requests for any special instructions on fingerprints and the trial judge gave none. The record shows that the opportunity to present same was specifically given before the charge to the jury began. The record further shows, in accordance with Rule 10(b)(2) of Appellate Procedure, that opportunity was given the defendant [and the State] at the conclusion of the charge to make objections out of the presence of the jury. No objections were made. The consequence is that the defendant is "precluded . . . from assigning as error any portion of the jury charge." *State v. Bennett*, 308 N.C. 530, 535, 302 S.E. 2d 786, 790 (1983).

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The allegedly omitted instruction on fingerprints is not included in the defendant's brief. We are left to speculate as to what the defendant now contends the trial judge should have said. The appellate court is not required to supply the words for an omitted special request for an instruction. However, in turning to the motion for a suspension of the rules mentioned earlier, we garner that appellate counsel now contends that the trial court should have said words to this effect:

that before you, the jury, can return a verdict of guilty, you would first have to find that the fingerprints of the defendant could only have been impressed at the scene of the crime at the time the crime was committed.

We hold that the alleged omitted jury instruction deals solely with a subordinate feature of the case. *State v. Bradley, supra*. As pointed out by Chief Judge Vaughn in *Bradley*, "Defendant's requested instruction [i.e. 'that fingerprints corresponding to those of the accused were without probative force unless the circumstances showed that they could have only been impressed at the time the crime was committed,' *Id.* at 363, 309 S.E. 2d at 513] concerned a subordinate feature of the case since it did not relate to the elements of the crime itself nor to defendant's criminal responsibility therefore." *Id.* A trial judge, absent a special request, is not required to charge on fingerprints. Knowledge of the existence of fingerprints may be used as evidence and may constitute a part of substantial substantive evidence without converting the subject of fingerprints from being a subordinate feature of the case. Whatever defendant's reliance upon *Bradley* may be, it is misplaced. In *Bradley* the error was in failing to give a specific, special instruction on fingerprints which had been appropriately requested. In *State v. Ward*, 300 N.C. 150, 155, 266 S.E. 2d 581, 585 (1980), a murder case, our Supreme Court emphasized that "the judge is not required to instruct the jury as to evidentiary matters essentially 'subordinate,' i.e. those which do not relate to the elements of the crime charged or to defendant's criminal responsibility." Also see *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977), wherein it was not prejudicial error to fail to charge on testimony concerning the victim's blood type since this did not concern a substantive feature of the case.

We hold it is not plain error to fail to give an unrequested instruction on fingerprints in the judge's charge to the jury. In

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reaching our conclusion we have examined the entire alleged instructional error and hold that its absence had no probable impact in the jury finding of guilt, and that the defendant has failed to bring himself within any of the arms of protection of the *Odom* rule.

[4] Further, we hold that the defendant was not denied the effective assistance of counsel by a failure of counsel to submit proposed jury instructions. *State v. Davis*, 66 N.C. App. 137, 142, 310 S.E. 2d 424, 427 (1984). It is the duty of the trial judge to prepare appropriate instructions to the jury, and the judge must "fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence . . . [and] may in his discretion also instruct on the subordinate and nonessential features of a case without requests by counsel." *State v. Harris*, 306 N.C. 724, 727, 295 S.E. 2d 391, 393 (1982). The failure of trial counsel to submit a request for jury instructions on fingerprints, a subordinate feature, is not ineffective assistance of counsel.

The record before us shows that defense counsel at trial was very good; he cross-examined vigorously, made numerous motions and objections which resulted in some favorable rulings, and put on a strong alibi defense. A mere reading of the transcript shows that trial counsel gave defendant "the representation of a skilled, capable, intelligent lawyer who handled his case in a manner consistent with the highest traditions of the legal profession." *People v. Eckstrom*, 43 Cal. App. 3d 996, 1003, 118 Cal. Rptr. 391, 395 (1974). In accordance with our application of the principles of *Strickland v. Washington*, --- U.S. ---, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), to the representation of counsel at trial on the motion for appropriate relief for alleged ineffective assistance, we hold that trial counsel did render reasonably effective assistance, and that there is no reasonable probability of a different result had trial counsel performed differently, nor is there a showing of a reasonable probability of a different result with "effective" assistance. Mr. Reilly has failed to show that his "counsel's representation fell below an objective standard of reasonableness." *Id.* at ---, 104 S.Ct. at 2065, 80 L.Ed. 2d at 693.

[5] The remaining issue, involving the proper scope and limits of cross-examination for impeachment of credibility of alibi wit-

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nesses into religious beliefs and affiliation with a particular religious group, arises from the third question presented for review. We hold that the trial judge properly allowed the State to impeach the credibility of the defendant's alibi witnesses by a showing of bias, interest and motive.

Four alibi witnesses testified concerning the activities and whereabouts of the defendant on the night in question. All said he was elsewhere than at the scene of the crime. All these witnesses, as did the defendant, belonged to a religious group called The Way International. This common bond was brought out on cross-examination. Representative excerpts follow.

Of the witness Karen Nelms, on cross-examination she was asked, "Do you contribute your wages [from work at the Pizza Hut] to The Way?" She answered that she did not give her wages but gave "[t]en percent or what I have [or] [w]hat I can give of that." There was no objection to any of this line of questioning.

To Mr. Reilly, defendant, on cross-examination, answered, over objection, that he knew that Karen Nelms "abundantly share[d]" her wages from her work at the Pizza Hut.

To Karen Nelms, on rebuttal on cross-examination, this time over objection, she again answered that she "abundantly share[d]" her wages from her work at the Pizza Hut when she had money to give.

To Mr. Reilly, on cross-examination, he was asked, "What happened to the money you all take up there in your fellowship hall?" His reply was, "It goes to The Way International." No objection was lodged. Thereafter, an objection was overruled to a question asking the witness if he knew to whom the money went. The response was that it went to Howard Allen, the treasurer of The Way International in New Knoxville. It was immediately following this that Mr. Reilly volunteered the answer that they called the taking care of money "Abundant Sharing." This was followed by further cross-examination of abundant sharing without any objection.

The defendant now contends that the most damaging portion of the improper cross-examination dealt with the testimony of the father of Karen Nelms, Mr. Delton Nelms. It appears that Mr. Nelms had sent his daughter Karen to a deprogramming center

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and had paid approximately \$19,000 to \$20,000 for it. The defendant now contends that the testimony transferred the trial into a "cult case."

When Karen was being cross-examined for the first time, she was asked: "You've been in a deprogramming center?" Before answer, counsel objected, moved to strike, and moved for a mistrial. After a discussion in the absence of the jury the court overruled the objection (although the specific question was never answered) and denied the motion for mistrial for the reasons that the State was entitled to attack credibility and to show bias or prejudice. The prosecutor also stated that he intended to put the father, Mr. Nelms, on the stand to attack credibility, which he subsequently did on rebuttal. Upon the return of the jury the court instructed them to "consider this evidence only if it bears on the credibility of the witness and for no other purpose whatsoever."

When again before the jury, Karen Nelms testified that she did not go to a center but to a house and that her parents had deprogrammers flown in. We hold this cross-examination was proper in leading to the next question and line of questions, to which there were no objections or exceptions, and which were essential to pave the way for the use of Karen's father as a State's rebuttal witness. These questions lead to the heart of impeachment of the credibility of Karen.

Q. Did you tell your father at that place that you were not with David Reilly on the night of 20 November, but that you intended to come here and say that you were anyway?

A. No, sir.

Q. You did not tell him that?

A. No, I did not.

Subsequently, on rebuttal for the State, Mr. Delton Nelms, Karen's father, testified. During a voir dire as to competency, requested by defense counsel, the court said he would allow Mr. Nelms to testify for the sole purpose of impeaching the credibility of Karen Nelms, and he gave an appropriate instruction upon the jury's return.

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The substance of Mr. Nelms' rebuttal testimony shows that he and Karen were having a general discussion at a friend's house [i.e. the deprogramming house, although during the voir dire counsel had agreed not to use, and did not use, the word again in the presence of the jury]. A narration follows:

We were having a general discussion . . . [a]bout what one of the boys had been charged with, I believe breaking and entering or something like this, and . . . I was asking was she involved with it. . . . [S]he told me that he didn't do it. . . . I asked her . . . how do you know he didn't do it, she said he told me he didn't do it. . . . [S]he told me she was intending to testify . . . [b]ecause she believed what he said. . . . *She told me she was not with him, but that she would testify* . . . [b]ecause she believed he was not there, he told her that he was not there and he didn't do it. (Emphasis added.)

We note that Anita Reece was the first defense witness. During her cross-examination she stated that Mr. Reilly, Pat Yacongis, Lee Metzger, Mark Edwards, Karen Nelms, and herself were all members of The Way and that all were about to testify for the defendant. The defendant did not object to this testimony. When asked to "tell us something about The Way Incorporated," she did so, and explained that "[i]t's a ministry on Biblical research, it teaches you about the Bible." This explanation was followed by five pages of testimony which involved the local and national organization, drawing no objection or exception from the defendant. A reading of the transcript of the testimony of the defendant's other witnesses shows that the general subject matter of The Way became a part of either their direct or cross-examination and to which no objection was made.

Collectively, the testimony of the defendant's alibi witnesses tended to corroborate his own testimony that he was with various members of The Way during the night of 20 November, and after the midnight hour stayed at the house of The Way fellowship. Such testimony tended to preclude Mr. Reilly's participation in any crime on 20/21 November. Thus, a showing of a special relationship between the witnesses and the defendant formed a part of the defense of alibi. Their interest or bias as fellow members of the same group was therefore open to cross-examination to impeach their credibility and was relevant and within the scope of

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approved cross-examination. See 1 Brandis, on North Carolina Evidence, Sec. 45 (1982). This section reflects the principles of law that the bias of a witness for a party is a circumstance to be considered in appraising the credibility and weight of his or her testimony, and that the existence of bias may be shown by the relationship of the witness to the party or his cause or by particular occurrences from which bias may be inferred. Brandis then states that

Precise limits on the range of circumstances from which bias may be inferred are neither possible nor desirable. To be admissible the evidence must tend to prove something which, rationally or in common experience, might induce the witness to falsify or to color the truth. If its only effect will be to play upon local prejudices, its admission is error. If it tends only slightly to prove bias, it may be admitted for what it is worth *Id.* at 171.

The trial judge is given discretion to control the cross-examination. *Id.*

As to questioning about religious beliefs Brandis reports that It has not been definitely decided whether, for impeachment purposes, a witness may be cross examined as to his religious beliefs; but such cross-examination should be confined to situations in which religious affiliation might indicate bias or adherence to a particular "religious" tenet could, in the circumstances, rationally raise a substantial doubt as to credibility—in other words, to situations in which potential unreliability is suggested by common sense, as distinguished from prejudice attributable to doctrinal differences between witness and jurors. *Id.* at Sec. 55.

Appellate review of the trial judge's rulings upon objections duly made is for a clear abuse of discretion or erroneous application of the law. *Id.* at 206.

While our case was tried prior to 1 July 1984, the date the new Rules of Evidence for North Carolina courts became effective, we feel that G.S. 8C-1, Rule 610 helps clarify, but does not change, prior law. This rule provides:

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing

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that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias.

In their comment upon the federal counterpart of Rule 610, Crotchett and Elkind in *Federal Courtroom Evidence*, 92.5 (1984), say that an "inquiry into the religious beliefs . . . of a witness for the purpose of showing . . . interest or bias because of them is not within the prohibition" of the rule, foreclosing this line of questioning.

In his brief the defendant noted that "[t]rial counsel observed in this case how *possibly* permissible limited cross-examination on bias was converted into a community scandal involving a religious cult, deprogramming, and recruiting of local membership," (emphasis in original), and contends that the State used evidence of religious affiliation to try the witnesses and the defendant "for what they believed and attempted to pass on to others." We disagree on the whole record before us. The trial judge did not abuse his discretion in allowing the evidence to be received on the issue of credibility and bias, which two word concepts are intertwined. *Rondale's Synonym Finder* 101 (1961) lists "preconceived idea" as one of its several synonyms for bias. The testimony of the witness, Karen Nelms, when contrasted with the testimony of her father, fits Karen's disclosure to her father that she had a "preconceived idea" that Mr. Reilly was innocent and that her idea was not based upon any tangible fact, but was based upon a personal relationship with him in The Way. The State properly questioned her about the circumstances. The State's questions were not directed to doctrinal differences between the witness and the jurors. If this group of which the defendant was a member was "not locally popular," as those words were used by Brandis, *supra*, at 205, the record fails to contain evidence to support such an assignment of error on appeal. Counsel's calling this a "cult case" or "an inflammatory inquisition of The Way" does not make it so. Mr. Reilly has failed to show any prejudicial error in the admission of evidence during the cross-examination of any witness. We also point out that the subject of The Way was introduced into the case without any objection, and through some of the witnesses by the defendant's counsel's own examination. We note that when evidence of the same import has been previously,

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or thereafter, received without objection, the conduct constitutes a waiver of the later objection.

The results are: the defendant has had a fair trial free from prejudicial error. His convictions stand.

The motion for appropriate relief for ineffective assistance of trial counsel is denied.

The motion to suspend the rules is denied. By virtue of the defendant raising in his brief the issue of plain error, and by virtue of the subject matter of his motion for appropriate relief, the defendant has been accorded appellate review of all of his contentions on fingerprints and jury instructions.

We find no plain error and no prejudicial error.

No error.

Judge WEBB concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

The fingerprint evidence, though not clear as to the fingerprints' exact location, is an aspect of the case for the jury's consideration but the defendant is entitled to have the jury consider it only after they have been properly instructed consistent with the mandate of *State v. Bass*, quoted by the majority. Here, the court's instruction did not contain adequate guidance for the jury and that omission constitutes error.

While evidence is unclear from the record on appeal as to the exact place on the cigarette machine where the matching prints were found, it is clear that the fingerprint evidence was the determinative factor in the decision to charge defendant Reilly rather than some other present or former employee. Captain Isaacs testified that he found the critical prints when he was examining the inside of the machine, but their being found on the machine is not inconsistent with defendant lawfully having placed his prints there while reaching and feeling for matches which had been "tripped" but had only fallen part way into the vending machine tray. Defendant, as a matter of habit, obtained matches

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from the machine and would have touched an interior area of the vending slot to retrieve a pack of matches which had fallen only part way. Prints placed in such an area would be locatable and capable of being lifted by officers only from the inside of the machine.

Defense counsel, for whatever reason, failed to request the *State v. Bass* instruction, failed to tender a proposed instruction and did not make timely complaint to the trial court about the omission of an adequate fingerprint instruction. No objection or exception appears. Ordinarily, Rule 10(b)(2) would bar appellant from asserting that error here, unless its omission from the trial court's charge amounted to plain error which would excuse the Rule 10(b)(2) violation.

The Supreme Court, in adopting the plain error rule, described it as:

Fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The facts here are such that the fingerprint evidence was fundamental and basic, indeed crucial, to the State's case and without the fingerprint evidence to tie defendant to the crime scene at the time in question, the State's case is highly questionable. The instruction omission permitted the jury to weigh the fingerprint evidence without guidance as to the controlling law and clearly had a probable impact on the jury's verdict.

The State contends, and the majority agrees, that the fingerprint evidence here is a subordinate feature of the case. While fingerprint evidence usually may be characterized as a subordinate feature of a criminal case, *State v. Bradley*, 65 N.C. App. 359, 309 S.E. 2d 510 (1983), in the instant case it is the *cornerstone* on which proof of the identity of the perpetrator rests.

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No other evidence, direct or circumstantial, links defendant to the scene of the crime more closely than anyone else. There were more than four keys which had been in the hands of employees or former employees who could have duplicated them. Employees other than defendant recently had terminated their employment at the victimized establishment.

To say, as the majority does, that the absence of the proper instructions on fingerprint evidence had no probable impact in the jury finding of guilt is, in my judgment, unrealistic and ignores the plain fact that the identification of defendant Reilly as the perpetrator rests on the fingerprint evidence as its keystone, around which the majority has marshalled every other possibly relevant circumstance, however remote. I would hold that the fingerprint evidence is not a subordinate feature of the case but is one on which, under these facts, the trial court should have instructed even without a special request.

North Carolina has approved the doctrine of plain error as an extraordinary relief mechanism to avoid the potentially "harsh results" of Rule 10(b)(2) but has not yet reversed a conviction based on plain error. This case presents a factually appropriate and legally correct occasion to invoke the plain error doctrine to reverse the conviction.

Except as it showed membership in The Way International as a common bond among the defendant's witnesses and defendant and a possible source of bias, the detailed cross examination of the alibi witnesses about the operations of The Way International exceeded the bounds of relevancy. It should not have been permitted to range so far afield. However, it was permitted for the most part without objection by defense attorney. I agree with the majority that whatever error might have occurred in permitting those questions did not amount to an abuse of the trial court's discretion and was not of the magnitude to merit a new trial, nothing else appearing.

Notwithstanding the lapses of trial counsel in failing to suggest and tender a fingerprint instruction, failing to object and except to its omission and failing to object to the irrelevant portions of the cross examination of defendant's alibi witnesses about The Way International, I would concur in the portion of the majority opinion which denies the motion for appropriate relief for ineffec-

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tive assistance of counsel. In summary, I would vote to reverse the conviction and award a new trial based on the trial court's failure to properly instruct the jury as to its consideration of fingerprint evidence.

BEATRICE JOHNSON INGLE v. CARNELL INGLE ALLEN, INDIVIDUALLY, CARNELL INGLE ALLEN, CO-EXECUTRIX OF THE ESTATE OF B. H. INGLE, SR., RUTH INGLE JOHNSON, INDIVIDUALLY, CARNELL INGLE ALLEN AND RUTH INGLE JOHNSON, TRUSTEES UNDER THE WILL OF B. H. INGLE, SR., W. A. JOHNSON AND MARTHA INGLE CURRIN

No. 8310SC1174

(Filed 6 November 1984)

1. Appeal and Error § 6.2; Rules of Civil Procedure § 56.7— immediate appeal of summary judgment against one of several defendants— not mandatory

The entry of summary judgment for only one of several defendants was an interlocutory order from which plaintiff could have appealed immediately under G.S. 7A-27 and 1-277, but she was not required to do so. Plaintiff's cross-appeal of the summary judgment, taken after the remaining defendants had appealed from the jury verdict, should not have been dismissed. G.S. 1A-1, Rule 54.

2. Attorneys at Law § 5.1— negligence—administration of estate in trust—summary judgment proper

In an action for negligence against an attorney where plaintiff was a beneficiary under a will and a trust and one of two co-executrices of the estate, summary judgment was properly granted for defendant because: there was no conflict of interest when defendant represented his client, the other co-executrix of the estate and a co-trustee, in an ejectment action against plaintiff involving property which was not an asset of the estate; defendant acted as a commissioner of the court when he assisted his client and another co-trustee in the purchase of estate property; and defendant properly advised the parties concerning their duties under the trust and merely performed a ministerial act by writing and mailing checks which distributed assets of the estate and left the trust in arrears. G.S. 1A-1, Rule 56(c).

Judge WELLS concurs in the result.

APPEAL by plaintiff from *Smith, Judge*. Order entered 10 August 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 18 September 1984.

This action was filed in the Superior Court of Wake County on 11 June 1980 in which plaintiff sought damages for breach of

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fiduciary duties, negligence and fraud arising from the administration of the estate and testamentary trust of B. H. Ingle, Sr., together with a request for an accounting and removal of Carnell Ingle Allen as co-executrix of the estate, and removal of Carnell Ingle Allen and Ruth Ingle Johnson as co-trustees of a trust created under the will.

The defendants Carnell Ingle Allen and Ruth Ingle Johnson filed a motion to dismiss for lack of subject matter jurisdiction, and the motion was allowed. On appeal to this court, judgment was reversed and the case remanded with instructions that plaintiff be permitted to amend her complaint. *Ingle v. Allen*, 53 N.C. App. 627, 281 S.E. 2d 406 (1981). On 9 September 1980, defendant W. A. Johnson, attorney, answered plaintiff's complaint and subsequently answered plaintiff's amended complaint.

On 16 November 1982, Judge Robert Farmer entered summary judgment for defendant W. A. Johnson and against the plaintiff. Plaintiff's motion to reconsider was denied by the trial court on 29 November 1982, and plaintiff filed objections and exceptions to the order of dismissal on 1 December 1982, but nothing more at that time.

On 10 December 1982, the jury rendered judgment against the remaining defendants, and the trial judge denied the motion of defendants Carnell Ingle Allen and Ruth Ingle Johnson for judgment notwithstanding the verdict on 14 December 1982, and they appealed. On 23 December 1982, plaintiff filed a cross appeal as to defendant W. A. Johnson.

On 9 August 1983, Judge Donald Smith dismissed plaintiff's cross appeal as to defendant W. A. Johnson. Plaintiff appealed to this court and simultaneously filed a petition for a writ of certiorari.

Tharrington, Smith & Hargrove, by John R. Edwards and Elizabeth F. Kuniholm for plaintiff appellant.

Young, Moore, Henderson & Alvis, P.A., by Edward B. Clark and B. T. Henderson, II for defendant appellee W. A. Johnson.

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HILL, Judge.

I

[1] Did the trial court err in dismissing plaintiff's appeal of the granting of summary judgment as to the defendant W. A. Johnson? The defendant W. A. Johnson contends the appeal by plaintiff must be taken within 10 days after entry of summary judgment on 29 November 1982 to comply with Rule 3 of the North Carolina Rules of Appellate Procedure and G.S. 1-279; that no objection or exception to summary judgment was made in apt time as required by G.S. 1A-1, Rule 46(b); and that the record on appeal was not filed in the office of the clerk of court and served on defendant W. A. Johnson within 30 days after appeal as required by Rule 11 of the North Carolina Rules of Appellate Procedure. This argument may succeed only if plaintiff, when given the opportunity to appeal from an interlocutory order, must appeal therefrom, thereby delaying the jury trial of the remaining issues and forcing plaintiff at that time to choose either a fragmented appeal or a loss of the right to appeal as to the claim determined in the interlocutory order. We conclude for the reasons which follow that an immediate appeal was not mandatory, and therefore, the trial court erred in dismissing plaintiff's appeal of the granting of summary judgment.

"A final judgment is one which disposes of the cause to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950); see also G.S. 1A-1, Rule 54. An appeal of right exists from any final judgment of the superior court to the Court of Appeals. G.S. 7A-27(b). On the other hand, an interlocutory judgment or order is "one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey, supra* at 362, 57 S.E. 2d at 381. An appeal may be taken from an interlocutory order only when expressly allowed by the rules of civil procedure or by statute. G.S. 1A-1, Rule 54(b). G.S. 7A-27 and G.S. 1-277 allow an appeal from an interlocutory order when such an order affects a substantial right, in effect determines the action and prevents a judgment from which an appeal might be taken, discontinues the action, or grants or refuses a new trial. An appeal also may be

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taken from an interlocutory order where the trial court makes a determination that there is no just reason for delay. G.S. 1A-1, Rule 54(b).

Applying these basic tenets to the case under review, we find that entry of summary judgment as to defendant W. A. Johnson was not a final judgment because plaintiff's claims against all other defendants were not determined at the time of entry. See G.S. 1A-1, Rule 54(b). Hence, plaintiff had no appeal of right from the entry of summary judgment as to defendant W. A. Johnson because it was not a final judgment in the cause. However, plaintiff might have appealed under G.S. 7A-27 and G.S. 1-277 if she so elected. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). Plaintiff did not so elect to appeal, but chose to go to trial on the remaining claims against the other defendants. When the jury returned its verdict against the other defendants and the other defendants appealed, plaintiff elected at that time to cross appeal as to defendant W. A. Johnson pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure.

Defendant W. A. Johnson argues that G.S. 1-277 has been interpreted to make an appeal allowed under that section mandatory. See *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967). If in fact the *Nuckles* case established that rule, it cannot now operate to bar plaintiff's appeal as to defendant W. A. Johnson for two reasons. First, the *Nuckles* case involved a special body of law—condemnation. Our Supreme Court, in interpreting G.S. 1-277, specifically relied on the special intent of G.S. 136-108, the condemnation statute involved. To allow appeal of the interlocutory order after trial of the action would have "completely thwart[ed] the purpose of G.S. 136-108." *Id.* at 14, 155 S.E. 2d at 784.

Second, the enactment of Rule 54 of the North Carolina Rules of Civil Procedure overruled *Nuckles* to the extent that it would require an interlocutory appeal to be taken where such an appeal would be allowed by Rule 54 or any other rule or statute. Where summary judgment is entered as to fewer than all defendants, there is no final judgment. G.S. 1A-1, Rule 54(b). Although plaintiff in the case before us could have appealed the entry of summary judgment as to W. A. Johnson, she was not required to do

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so. This fact finds verification in the case of *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 301 S.E. 2d 414 (1983).

In the *Carnation* case, the plaintiff filed suit against three defendants. The complaint contained seven claims, two of which were against two defendants only and five of which were against the third defendant. In January 1981, the court granted summary judgment on three claims, including the two solely against the two defendants. In January 1982, the plaintiff went to trial against the remaining defendant. At the close of his evidence, plaintiff took a voluntary dismissal as to the remaining defendant and gave notice of appeal as to the summary judgment entered for the other two defendants one year earlier.

On appeal, the defendants argued that plaintiff had lost his right to appeal as to them by failing to give notice of appeal within ten days of the entry of summary judgment in their favor in January 1981, one year before trial and dismissal as to the remaining defendant. This Court disagreed, saying that prior to the plaintiff's dismissal in January 1982, there was no final judgment and therefore "no procedural occasion which made it mandatory for the plaintiff to exercise his otherwise interlocutory right of appeal." *Id.* at 386, 301 S.E. 2d at 417. Although plaintiff could have appealed the entry of summary judgment, he was not required to do so. *Id.* By choosing to proceed to trial as to the remaining defendant, he lost his right to have all defendants tried in one lawsuit but not his right to appeal. *Id.* at 387, 301 S.E. 2d at 418.

Judge Braswell in *Carnation* defined with clarity the choices of the plaintiff:

By not exercising his procedural right to immediately appeal on 1 January 1981, plaintiff had to go on to trial as to one defendant only. He ran the risk, if successful on this appeal to have summary judgment reversed, of having to go to trial twice on similar subject matter claims. Plaintiff lost his right to have all three party-defendants tried together in one lawsuit.

Id. at 386-87, 301 S.E. 2d at 417-18.

In effect, the question is not one of appeal or no appeal. Rather it is a choice between one or two trials. The case sub

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judice was finally disposed of on 14 December 1982, when the trial judge denied the defendants' motion for judgment notwithstanding the verdict, or in the alternative for a new trial. This constituted a final judgment because it finally disposed of all the claims of all the parties. The fact that plaintiff waived her right to appeal the order granting summary judgment to the defendant W. A. Johnson in no way affected her statutory right to appeal from the final judgment. Plaintiff served her notice of appeal on 23 December 1983, well within the 10 day period allowed under Rule 3(c) of the North Carolina Rules of Appellate Procedure and G.S. 1-279(c).

Defendant W. A. Johnson next argues that plaintiff has failed to preserve her exception to the entry of summary judgment in his favor and plaintiff has failed to comply with the rules of appellate procedure in filing and serving her proposed record on appeal. Defendant W. A. Johnson does not argue these points in his brief but neither does he abandon them. We have examined the record on appeal and find no error. We conclude that defendant W. A. Johnson was properly before the court.

II

[2] In a supplemental brief, plaintiff contends the trial court erred in granting summary judgment for defendant W. A. Johnson because (1) there existed issues of material fact to be determined by the jury involving defendant W. A. Johnson's negligence as attorney, and (2) the evidence was sufficient to create an issue of material fact with regard to whether defendant W. A. Johnson owed a duty of care to the plaintiff and failed to exercise due care in the fulfillment of that duty. We find that summary judgment was properly granted.

Upon motion a summary judgment will be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the absence of a triable issue of fact. His papers are meticulously scrutinized and all inferences are decided against him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). In ruling on a mo-

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tion for summary judgment, the court will not decide issues of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). "However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). An issue is genuine if it "may be maintained by substantial evidence." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E. 2d 190, 193 (1980), quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901, *reh'g denied*, 281 N.C. 516 (1972). When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979); *Johnson v. Lockman*, 41 N.C. App. 54, 254 S.E. 2d 187, *cert. denied*, 297 N.C. 610, 257 S.E. 2d 436 (1979).

Applying these basic tenets to the case under review, we address plaintiff's contention that summary judgment was improperly granted. We find no quarrel with plaintiff's contention that defendant W. A. Johnson owed a duty of care to the plaintiff as a beneficiary under the will. Since she had retained her attorney to assist her as co-executrix of the estate, she must look to that attorney for protection in the areas of administration of the estate. It is well settled in North Carolina that privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party. *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 268 S.E. 2d 12, *cert. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980). This court has recognized the general principle of tort law adopted in the Restatement (Second) of Torts:

[U]nder certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking.

Condominium Assoc. v. Scholz Co., *supra* at 522, 268 S.E. 2d at 15, citing Restatement (Second) of Torts § 324A (1965).

This duty to protect others from harm arises under those circumstances where one person is in a position toward another such

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that "anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other." *Condominium Assoc. v. Scholz Co.*, *supra* at 522, 268 S.E. 2d at 15, quoting *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666-67, 255 S.E. 2d 580, 584, *cert. denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979).

Whether a party has placed himself in a position where his affirmative conduct may be expected to affect the interest of another person, so that tort law will impose upon him an obligation to act in such a way that the other person will not be injured, requires balancing of these factors:

- (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

Leasing Corp. v. Miller, 45 N.C. App. 400, 406-07, 263 S.E. 2d 313, 318, *cert. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980); *see also Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981). If the evidence, direct or circumstantial, is sufficient as to any of these factors, it will create a jury question as to whether such a duty exists and whether it was breached by the defendant. *See Condominium Assoc. v. Scholz Co.*, *supra* at 529, 268 S.E. 2d at 19; *Alva v. Cloninger*, *supra* at 609, 277 S.E. 2d at 540.

A review of the evidence is as follows:

Plaintiff Beatrice Johnson Ingle married B. H. Ingle, Sr., father of the defendants Carnell Ingle Allen and Ruth Ingle Johnson, on 1 June 1969. She was B. H. Ingle's second wife. Plaintiff and B. H. Ingle entered into an antenuptial agreement dated 30 May 1969 under which both parties agreed to relinquish all rights of inheritance, and plaintiff agreed to accept the trust provisions of the will of B. H. Ingle. Mr. Ingle died 9 September 1971. His will dated 9 February 1971 was admitted to probate, and plaintiff and defendant Carnell Ingle Allen qualified as co-executrices of the will. Plaintiff retained attorney Gordon Kelley to assist her as

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co-executrix of the estate. Defendant Carnell Ingle Allen retained defendant W. A. Johnson to assist her in administration of the estate. Both plaintiff and defendant Carnell Ingle Allen agreed that defendant W. A. Johnson would keep the checkbook and write all checks in connection with the administration of the estate, but each co-executrix would sign the checks and other documents.

B. H. Ingle's will provided in pertinent part as follows:

SECOND: I give, devise and bequeath . . . my house on Ingle Road formerly known as the parsonage of the church, to my beloved wife, Beatrice Johnson Ingle [plaintiff] for her life, or until she remarries, whichever is earlier and the remainder estate to my children. . . .

I direct that capital repairs, insurance and taxes be paid for from the trust fund hereinafter established during the estate of my beloved wife, Beatrice Johnson Ingle.

. . .

FIFTH: I give and bequeath . . . to my wife, Beatrice Johnson Ingle, the "basic household furniture," furnishings and equipment in our home to permit her to furnish her residence on Ingle Road described above and the sum of \$500.00.

. . .

SEVENTH: I give, bequeath and devise all of the residue of my property, both real, personal or mixed, in trust, to Carnell Ingle Allen and Vaughan S. Winborne, Co-trustees, (Ruth Ingle Johnson, the first substitute trustee. . . .) During the life of this Trust, I direct that \$125.00 per month be paid to my wife, Beatrice Johnson Ingle, "first from the income, and, if said income is insufficient, from the principal (sic.) of said Trust. . . . The said Trustees are . . . empowered to sell, buy, invest and reinvest in stocks, bonds, savings accounts, and other securities properties (real and personal) as they deem proper without being restricted by statutes or court decisions regulating fiduciaries.

The trust terminated on death or remarriage of the plaintiff, and upon termination the assets were to be distributed to his children.

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Plaintiff contends that there are various areas in which defendant W. A. Johnson breached his duty toward her and that the evidence was sufficient to create a jury question. She further contends that defendant W. A. Johnson has failed to carry his burden of affirmatively showing he was entitled to summary judgment. We address the following areas of contention: (1) conflict of interest in the eviction proceeding; (2) negligence in representing the estate—assisting the purchase and sale of estate property by executrices and trustees; and (3) negligence in representing the trust—failure to pay arrears and distribution of corpus.

(1) *Conflict of interest in the eviction proceeding.* At the time of B. H. Ingle's death, he and his wife, the plaintiff, were living in a house on Lake Wheeler Road. This property had been conveyed to defendant Carnell Ingle Allen by B. H. Ingle by deed dated 9 March 1970 and duly recorded. Plaintiff knew it was Carnell Ingle Allen's house before she married B. H. Ingle.

On 10 January 1972, some four months after the death of B. H. Ingle, Carnell Ingle Allen brought an ejectment action against plaintiff on the advice of defendant W. A. Johnson. He represented Carnell Ingle Allen in the ejectment proceeding, and attorney Gordon B. Kelley represented plaintiff. Carnell Ingle Allen secured judgment against the plaintiff for her ejectment and money damages for a portion of the time the house was occupied by plaintiff.

We find no conflict of interest in defendant W. A. Johnson's representing Carnell Ingle Allen in the ejectment proceeding. Plaintiff's contention that the parsonage house devised to her under the will was uninhabitable is immaterial. Title had vested in Carnell Ingle Allen long before B. H. Ingle's death, and plaintiff was aware of this. The property was not an asset of the estate and had no connection therewith. This argument of plaintiff is without merit.

(2) *Negligence in representing the estate.* B. H. Ingle, Sr. owned three tracts of real estate at the time of his death. There was insufficient personal property with which to pay the debts of the estate, the costs of administration, and to fund the trust created under the will. Shortly after assuming his duty as attorney for Carnell Ingle Allen, defendant W. A. Johnson on several occasions notified Carnell Ingle Allen and plaintiff through her

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attorney of the need to sell real estate to create assets. Between 1971 and 1977 the trustees endeavored to sell at a private sale two of the tracts to fill the needs arising under the will and under the trust, but retaining the parsonage tract under which plaintiff had a life estate.

On 3 August 1976, plaintiff and the defendant Carnell Ingle Allen as co-executrices petitioned the court for sale of the Maywood Avenue property to pay debts. On 10 February 1977 an order was entered by the clerk of court authorizing sale of the lands at public auction and appointing defendant W. A. Johnson as commissioner to sell the lands. Acting as commissioner on 18 March 1977, defendant W. A. Johnson received a bid of \$15,000.00 from the defendant Carnell Ingle Allen. She had bid this sum to establish a base on which to start the bidding. No upset bid was made, and defendant Carnell Ingle Allen as co-executrix advised defendant W. A. Johnson not to seek confirmation. A real estate agent had advised her that the property was worth more than \$15,000.00. The clerk of court entered an order declining to confirm the sale and granting defendant W. A. Johnson the right as commissioner to employ a realtor to sell the property. No private sale was generated, and defendant W. A. Johnson, as commissioner, again sold the property at public auction on 22 October 1977 to Martha Ingle Currin for \$8,700.00. Defendant W. A. Johnson at this time, as commissioner, recommended that the sale be confirmed.

Although Martha Ingle Currin was the high bidder at the second sale, she testified that she had bid for her brother, Albert Ingle. The 10% good faith deposit required was made with three checks each in the sum of \$270.00, each issued by Martha Ingle Currin, Ruth Ingle Johnson, and Carnell Ingle Allen. Defendant W. A. Johnson, as commissioner, on 4 November 1977 advised Carnell Ingle Allen that he assumed the deed was to be made to them but inquired as to how the deed was to be made. Meanwhile, on 3 November 1977, plaintiff had retained a new attorney, J. Harold Harrington, who wrote the defendant W. A. Johnson, explaining that he was distressed to hear that he was considering recommending the sale not be confirmed, and recommended confirmation. The sale was confirmed by the court on 10 November 1977, and defendant W. A. Johnson wrote Martha Ingle Currin de-

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manding payment and stating that he was going to make the deed to her.

On 18 November 1977, Martha Ingle Currin and Ruth Ingle Johnson through Lawrence Brothers Realty assigned their bid to Barney C. Joyner and wife for \$12,000.00. The contract was not signed by Carnell Ingle Allen, but she and her two sisters met the realtor in the reception room of defendant W. A. Johnson. In the absence of defendant W. A. Johnson, the realtor delivered each a check for \$1,153.74. Carnell Ingle Allen testified that defendant W. A. Johnson did not know of the assignment when made and was not aware of the three checks paid to the three sisters. Each sister made a profit of \$863.00. At some time defendant W. A. Johnson became aware of the contract by the three women to sell the property, and he became upset. He did not see the sales agreement until after it was signed, but he did know of the assignment of bid since he prepared the deed to the Joyners. Defendant W. A. Johnson avers in his affidavit that he had no knowledge of the assignment of the bid until he made the deed and did not know of any profit made by anyone by reason of the assignment. Defendant W. A. Johnson received and disbursed \$8,700.00 only, the amount bid at the court sale.

Plaintiff contends that (a) defendant W. A. Johnson knew in both the first sale, which was not confirmed, and in the second sale, which was confirmed, that defendants Carnell Ingle Allen and Ruth Ingle Johnson were purchasing trust property and that he did nothing to advise them that such a purchase was invalid; and (b) defendant W. A. Johnson assisted the sisters in becoming the purchasers of the property at a time when Carnell Ingle Allen was a co-executrix and a co-trustee with Ruth Ingle Johnson under the will. Based upon these contentions, plaintiff asserts that defendant W. A. Johnson's failure to recognize the problems arising when a fiduciary becomes a purchaser of property with which he is entrusted in his capacities as a fiduciary, see *Smith v. Smith*, 261 N.C. 278, 134 S.E. 2d 331 (1964), along with his failure to prevent the consummation of the sale constituted nonfeasance and were clearly detrimental to the plaintiff. Plaintiff further argues that defendant W. A. Johnson had the responsibility when he learned the sisters had sold the property to inquire whether they had made a profit and to demand that such profit be returned to the estate.

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Plaintiff's arguments are misplaced under the facts of this case. When the co-trustees petitioned the court to appoint a commissioner to sell the real estate, and the court appointed the commissioner to make the sale, all rights and obligations in connection with the sale and purchase of the property vested in the court. Only the court could affirm or reject a sale, and the terms and conditions thereof. We know of no case limiting the court operating through its officers and agents in such sales. It is the function of the court to determine that the price received is fair and adequate and is as much as can reasonably be expected to be received for the premises. Once this is determined, it is the function of the court to confirm the sale. The executor, administrator or trustee has no obligation in connection therewith.

The bidders stood as strangers at the sale with no more rights and no more responsibilities than any other bidder. The clerk of court confirmed the sale at \$8,700.00. Thereafter it was the duty of the commissioner to collect the purchase price and deliver the deed, and then to submit his final report for approval by the court. This was done.

(3) *Negligence in representing the trust.* Early after defendant W. A. Johnson became attorney for the estate, he advised plaintiff that real estate must be sold to fund the trust. Defendant W. A. Johnson in his affidavit and Carnell Ingle Allen in her deposition testified that defendant W. A. Johnson did not represent the trustees and he advised the trustees that as soon as the estate was closed the trustees were "on their own." He further advised the trustees that the debts of the estate must first be paid and then the trust must be funded.

As early as 1971 the trustees began efforts to sell the real estate and fund the trust. The property was listed with realtors, but no buyer was ever procured. During this time, accumulated debts were paid, and there was no money with which to establish the trust fund.

The initiation of monthly payments to plaintiff began in 1979 when proceeds were generated from the sale of two pieces of property. On 11 September 1979 defendant W. A. Johnson transmitted a check to the plaintiff under a cover letter reading as follows:

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On behalf of Mrs. Carnell I. Allen and Mrs. Ruth I. Johnson, Trustees under the will of B. H. Ingle, Sr., deceased, I am herewith advising you that said Trustees have now come into funds with which to establish a trust account out of which they can make monthly payments directed to be made to you under the terms of Mr. Ingle's will. As you know, this will provides that when the trust account is established the Trustees will pay you \$125.00 per month for the balance of your life or until your remarriage. Accordingly, I enclose Trustees' check in the amount of \$125.00 constituting the first payment due under the terms of Mr. Ingle's will.

Plaintiff first argues under this assignment that the only inference that can be drawn from the evidence is that defendant W. A. Johnson negligently advised defendants Carnell Ingle Allen and Ruth Ingle Johnson that the arrears need not be paid. When a trust is created by will under the terms of which a beneficiary is entitled to payments for a designated period, the beneficiary is entitled to payment from the date of death of the testator, unless otherwise provided in the will. *Trust Co. v. Grubb*, 233 N.C. 22, 62 S.E. 2d 719 (1950). However, when taken in context with the undisputed evidence in the record, it is apparent that defendant W. A. Johnson was nothing more than a conduit through which the check passed to plaintiff. The language of the letter does nothing more than identify the check as the first payment due under the trust and in no fashion addresses the total payments which may be due plaintiff.

Plaintiff next argues that defendant W. A. Johnson was negligent in writing checks for the distribution of assets created under the sale of the two properties. Yet, the record is replete with evidence that defendant W. A. Johnson advised defendants Carnell Ingle Allen and Ruth Ingle Johnson to sell lands to pay debts and fund the trust. The record shows attempts to sell the land through the early stages of administration of the estate with no success. And it is apparent from letters to plaintiff's attorneys that defendant W. A. Johnson kept plaintiff advised of the efforts made.

When Carnell Ingle Allen and Ruth Ingle Johnson advised defendant W. A. Johnson that they had \$77,923.98 from the sale of a 12.245 acre tract, defendant W. A. Johnson explained the

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terms of the will and advised them as to the establishment of the trust and the manner in which the trust fund would be used. Carnell Ingle Allen and Ruth Ingle Johnson insisted on the distribution of the monies, contending there would be adequate monies from the sale of other lands to meet payments to plaintiff. Defendant W. A. Johnson pointed out the possible liability to the beneficiary and legal ramifications. Both trustees insisted they understood and were willing to take the risk. Defendant W. A. Johnson thereafter explained that not all the funds should be distributed, but rather sufficient funds should be held to permit the estate to be closed. The trustees decided to distribute \$64,000.00, leaving a balance of \$13,923.98 to be paid to Carnell Ingle Allen as co-executrix. Carnell Ingle Allen testified in her deposition that the distribution of the liquid assets were made contrary to defendant W. A. Johnson's advice.

Defendant W. A. Johnson did write the checks for the distribution. Plaintiff contends that since the assets of the estate were controlled by the co-trustees and defendant W. A. Johnson, he was negligent in participating in the wrongful distribution by writing the checks. Plaintiff contends such distribution was a direct violation of the terms of the will and North Carolina law since insufficient assets were left to pay the arrearages. See *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). We conclude that defendant W. A. Johnson committed nothing more than a ministerial act in writing the checks and mailing them to the beneficiaries, and properly advised the parties concerning their duties under the trust. This assignment of error is overruled.

In conclusion, when we address the responsibility of defendant W. A. Johnson toward all parties in interest—the co-executrix, the court or commissioner, the beneficiaries under the will including the trust and its beneficiary—we resolve that he exercised the ordinary care and skill in his conduct required as attorney for the estate. The overwhelming direct evidence totally explains away any inferences, innuendoes, and mere allegations of negligence which plaintiff argues were sufficient to create an issue of material fact. Once the movant established the absence of any issue of material fact, the opposing party must come forward with facts rather than mere allegations, which negate the moving party's case. *Hotel Corp. v. Taylor and Fletcher v. Foremans*,

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Inc., 301 N.C. 200, 271 S.E. 2d 54 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467 251 S.E. 2d 419 (1979). This the plaintiff has failed to do.

Because of the disposition made herein, the petition for writ of certiorari filed in this cause on 19 January 1984 is dismissed. The decision of the trial court in dismissing plaintiff's appeal of the granting of summary judgment as to defendant W. A. Johnson is

Reversed.

The decision of the trial court in granting summary judgment for defendant W. A. Johnson is

Affirmed.

Chief Judge VAUGHN concurs.

Judge WELLS concurs in the result.

HOWARD R. BIGGERS, JR., RENNIE BIGGERS, AND CAROL BIGGERS DABBS
v. FELIX A. EVANGELIST AND WIFE PAULA A. EVANGELIST

No. 8326SC1025

(Filed 6 November 1984)

1. Deeds § 11.2; Vendor and Purchaser § 1— contract for sale of realty—no merger into deed

A contract for the sale of realty did not merge into the deed where the contract contained a provision that all covenants, representations, warranties and agreements set forth therein survived the closing date and the execution of the deed; therefore, the sellers were entitled to bring an action on the contract.

2. Limitation of Actions § 4.6; Seals § 1— contract action—sealed instrument—statute of limitations

The ten-year statute of limitations applicable to actions on sealed instruments applied to an action on a contract for the sale of land where the word "seal" appeared in brackets next to the signatures of the parties. G.S. 1-47.

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3. Easements § 4.3; Vendor and Purchaser § 4— contract for sale of realty—right to reserve easements in roads

A clause in a contract for the sale of realty providing that the property "shall" be conveyed to the buyers free and clear of liens, encumbrances, claims, easements and restrictions except that said property "may" be conveyed subject to rights-of-way in two named roads gave the sellers the power expressly to reserve such rights-of-way in the deed but did not invalidate the sellers' conveyance in the deed of their easements and their "rights and interests" in the two roads or entitle the sellers to seek rights-of-way in the roads after the conveyance.

4. Attorneys at Law § 3.1; Principal and Agent § 5.2; Vendor and Purchaser § 3—description in deed—authority of attorney to make parol agreement

Where an attorney had actual authority to negotiate a real estate transaction on behalf of the sellers, the sellers are bound by the attorney's parol agreement, made within the scope of his authority, as to the description of the property to be placed in the deed conveying the property to the buyers even though the parol agreement modified the terms of the written agreement between the parties.

5. Easements § 5.3— easements by implication—sufficiency of evidence

Plaintiffs established a right to an implied easement in two roads arising from prior obvious or manifest use for access to and from a retained 3-acre tract and a 1.22-acre tract. However, plaintiffs failed to establish a right to an implied easement in either of the roads for a 26-acre tract or a second 3-acre tract where neither road bordered the 26-acre tract at the time of severance, and where the second 3-acre tract was bordered by a third road.

APPEAL by defendants from *Gaines, Judge*. Judgment entered 21 June 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 June 1984.

Blakeney, Alexander & Machen, by Whiteford S. Blakeney, and Boyle, Alexander, Hord & Smith, by B. Irvin Boyle, for plaintiff appellees.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendant appellants.

BECTON, Judge.

On 1 December 1980, plaintiffs, Irene R. Biggers* and her children, Howard R. Biggers, Jr., Rennie Biggers, and Carol Biggers Dabbs (the Biggers) sought to reform, on the ground of

*Irene R. Biggers' name has been omitted from the caption of the case, but it is clear from the pleadings that she was a party to the action.

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mutual mistake, a deed, dated 1 July 1975, from Irene and her husband, Howard R. Biggers, Sr. (since deceased) to the defendants, Felix A. Evangelist and his wife, Paula A. Evangelist, conveying a 9.432 acre tract including the homeplace. The Biggers alleged that the deed mistakenly failed to reserve to the Biggers a right-of-way along the two private access roads, Bent Branch Road and Wild Holly Lane, to reach their remaining property and, in fact, arguably conveyed all their easements and fee title interest in the two roads. Moreover, the deed mistakenly included within its 9.432 acre metes and bounds property description the entire width of Bent Branch Road (60 feet) for a 187.59 foot long section, thereby expressly giving the Evangelists fee title interest in that section of the road.

The Biggers first asked the trial court to grant them a 60-foot wide private right-of-way along the two private roads to reach their remaining undeveloped property. Later the Biggers amended their Complaint by asking the trial court to reconvey fee title interest in one-half the width of Bent Branch Road (30 feet) for the 187.59 foot long section. The Evangelists pleaded N.C. Gen. Stat. Sec. 1-52(9) (1983), the three-year statute of limitations applicable to actions for relief on the grounds of fraud or mistake, in bar. The Biggers then added a second theory of recovery to their Complaint—specific performance of the written contract for purchase and sale of real estate, dated 22 May 1975. They asked the trial court to conform the deed to the contract and for “such other and further relief as the court may deem just and proper.”

On 21 June 1983 the trial court, after a bench trial, concluded that the written contract (1) mandated a conveyance subject to rights-of-way of Bent Branch Road and Wild Holly Lane; (2) voided the provisions of the third paragraph of the deed, dealing with the Biggers' easements; and (3) voided the conveyance of fee title to the 30-foot wide strip of Bent Branch Road beyond the centerline. In addition, the trial court concluded that the Biggers were entitled to easements by implication to reach their remaining property and that the three-year statute of limitations, G.S. Sec. 1-52(9) (1983), was inapplicable to an action to enforce a written contract under seal.

The Evangelists appeal. We affirm in part and reverse in part.

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I

[1] Generally, a contract for the sale of land is not enforceable when the deed fulfills all the provisions of the contract, since the executed contract then merges into the deed. *Gerdes v. Shew*, 4 N.C. App. 144, 166 S.E. 2d 519 (1969); 26 C.J.S. *Deeds* Sec. 91(c) (1956). However, it is well-recognized that the intent of the parties controls whether the doctrine of merger should apply. *Stewart v. Phillips*, 154 Ga. App. 379, 268 S.E. 2d 427 (1980) (survival clause—no merger); *Bryant v. Turner*, 150 Ga. App. 65, 256 S.E. 2d 667 (1979) (closing statement revealed intent not to merge); *Vaughey v. Thompson*, 95 Ariz. 139, 387 P. 2d 1019 (1963), 8A G. W. Thompson, *Real Property* Sec. 4458 (1963 & Supp. 1981); Annot., 38 A.L.R. 2d 1310 (1953). Although we find no North Carolina case directly on point, the intent of the parties is the guideline in contract interpretation, *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973), and the statutorily mandated guideline in deed construction. N.C. Gen. Stat. Sec. 39-1.1 (1976); *Whetsell v. Jer-nigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976). Moreover, the intent of the parties dictates whether an earlier contract is discharged by a later contract. *Turner v. Turner*, 242 N.C. 533, 89 S.E. 2d 245 (1955). Applying the rationale of our statutory and case law to the facts at hand, we, therefore, look to the instruments to discern the parties' intent.

The Biggers-Evangelist contract contains a survival provision, which reads as follows:

All covenants, representations, warranties, and agreements set forth in this contract shall survive the Closing date, and shall survive the execution of all deeds and other documents at any time executed and delivered under, pursuant to, or by reason of this Contract, and shall survive the payment of all monies made under, pursuant to, or by reason of this Contract.

None of the other contractual provisions counter the clear intent of the parties, as shown in the survival provision, to avoid the doctrine of merger. Nor does the language of the deed suggest that the parties had waived the survivability of the contract by the closing date.

We conclude that the Biggers-Evangelist contract did not merge in the deed; the parties' clearly-defined intent rebuts the

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presumption of merger. The Biggers were entitled to bring an action on the contract.

II

The Evangelists pleaded the three-year statute of limitations, G.S. Sec. 1-52(9) (1983), in bar to the Biggers' original cause of action, concerning reformation of the deed on the ground of mutual mistake. Since the trial court based its judgment on the Biggers' second cause of action—the specific performance on the contract—we need not discuss the statute of limitations applicable to deed reformation further.

[2] Which statute of limitations is applicable to the Biggers' contract action? Biggers offered the contract in evidence; the word "seal" appears in brackets next to the parties' signatures. Evidence of the word "seal" in brackets is sufficient to overcome the three-year statute of limitations; thereby qualifying the contract as a sealed instrument. *Lee v. Chamblee*, 223 N.C. 146, 25 S.E. 2d 433 (1943). The ten-year statute of limitations, N.C. Gen. Stat. Sec. 1-47 (1983), applicable to actions on sealed instruments against a principal thereto, governs the Biggers' contract action.

The trial court did not err in allowing the Biggers to proceed with their contract action.

III

Having concluded that the Biggers were entitled to pursue their action on the contract in the abstract, we now are faced with the specific enforceability of its particular terms. The trial court relied on selected language from the contract and testimony by the parties in concluding that the contract entitled the Biggers to a right-of-way over Bent Branch Road and Wild Holly Lane, and that the contract did not convey the Biggers' easements or fee title to the entire 60-foot width of Bent Branch Road for 187.59 feet. The Evangelists contend that "[t]he evidence does not support the [trial] court's findings and conclusions on the merits, but compels contrary findings and conclusions." After reviewing the language of the contract in context, discussed *infra*, we agree with the Evangelists. We conclude that the contractual terms relied on by the Biggers do not entitle them to relief; the cited terms are not enforceable against the Evangelists. We therefore reverse.

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When a contract term is clear and unambiguous, the express language of the contract controls its meaning, *Crockett v. First Federal Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 224 S.E. 2d 580 (1976), and the trial court cannot resort to extrinsic evidence to determine the parties' intent. *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E. 2d 377 (1981). Apparently, as is clear from its findings of fact, the trial court implicitly determined that the two contested terms relied on by the Biggers discussed in detail *infra*, were ambiguous since it admitted evidence of the parties' intent on each of them. We find that the first contested term, which allegedly reserved a right-of-way to the Biggers and voided the conveyance of the Biggers' easements, was unambiguous. Therefore, the express language controls, and the intent of the parties is a question of law for this Court to decide. *Lane v. Scarborough*. The second contested term, involving the property description, although arguably ambiguous, does not control. Therefore, the trial court's conclusions of law are ill-founded. The trial court's conclusions of law are reviewable *de novo* on appeal. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). For the reasons discussed below, we conclude that neither term grants the Biggers their desired relief.

A.

The First Contested Term—Rights-of-Way of Bent Branch Road and Wild Holly Lane

[3] The deed from the Biggers to the Evangelists did not expressly reserve to the Biggers a right-of-way over Bent Branch Road and Wild Holly Lane to reach their remaining vacant property. Further, the third paragraph of the deed allegedly conveyed all the Biggers' easements as well as their "rights and interests" in Bent Branch Road and Wild Holly Lane. The third paragraph of the deed reads as follows:

The parties of the first part do also assign and convey to the parties of the second part, their heirs, successors and assigns, all their right, title, and interest in and to the easements (i) reserved in Deed to Robert S. Speizman and wife, Carol Kantor Speizman recorded in Book 3267, Page 399 of the Mecklenburg County Public Registry, and (ii) reserved by parties of the first part in all other deeds, agreements, or instruments which are appurtenant to or relate to the prop-

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erty hereinabove conveyed to the parties of the second part (including all rights and interests of the parties of the first part in and to Bent Branch Road and Wild Holly Lane).

The trial court, relying on language excerpted from the fifth clause of the contract *and on the parties' testimony*, concluded that the contract mandated the reservation of a right-of-way over Bent Branch Road and Wild Holly Lane and voided the third paragraph of the deed. The trial court found: "The Evangelists would accept conveyance of the property 'subject to rights-of-way of Bent Branch Road and Wild Holly Lane.'" From this finding, the trial court concluded that the provisions of the third paragraph of the deed, as discussed above, were "not only unauthorized by the contract but . . . directly contrary to the contract provisions, referred to above, under which the Evangelists agreed to accept conveyance 'subject to rights-of-way of Bent Branch Road and Wild Holly Lane.'" We reverse.

Preliminarily, we note that: "The intention of the parties is to be collected from the entire instrument and not from detached portions." *Westinghouse Electric Supply Co. v. Burgess*, 223 N.C. 97, 100, 25 S.E. 2d 390, 392 (1943). Therefore, we must look at the language of the fifth clause in context as well as the language of the contract as a whole. The fifth clause reads, in pertinent part, as follows:

Sellers *shall* deliver to the Buyers at the Closing, a Deed with full warranties . . . conveying to Buyers, an indefeasible fee simple marketable and insurable title to the property. . . . Said property *shall* be conveyed to the Buyers, without exception, free and clear of liens, encumbrances, claims, easements, leases, restrictions and restrictive covenants except that said property *may be conveyed subject to* (i) *rights-of-way of Bent Branch Road and Wild Holly Lane* (ii) public utility rights-of-way in the customary form to service the premises (iii) Mecklenburg County *ad valorem* taxes for the year 1975 and (iv) zoning ordinances of Mecklenburg County. . . . Should Buyers' attorney not approve the title to said property, Buyers' attorney *shall* advise Sellers in writing. . . . In the event that said objections of Buyers' attorney are not cured or remedied by the date of closing . . . this Contract *shall*, at Buyers' option, become null and void and be of no further legal effect. . . . (Emphasis added.)

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The trial court failed to distinguish between the differing meanings of the words "shall" and "may" in the above clause. In construing contracts, ordinary words are given their ordinary meanings. *Harris v. Latta*, 298 N.C. 555, 259 S.E. 2d 239 (1979). The primary verbs used in the fifth clause are "shall" and "may." "Shall" is defined as "will have to: MUST." Webster's Third New International Dictionary 2085 (1968). "May" is defined as "have the ability or competence to: CAN." *Id.* at 1396. Since the language is unambiguous, extrinsic evidence of the parties' intent need not be considered. *Lane v. Scarborough*. The parties agreed in this clause that the Biggers would deliver a deed with "full warranties," but with certain exceptions. If, at the time of the conveyance, any or all of the conditions listed in subsections (i)-(iv) existed, the Evangelists were not entitled to declare the contract void for breach of warranty. For example, had the Biggers included an express reservation of a right-of-way in the deed, the Evangelists would not have been able to avoid their bargain. Or, if the Evangelists had discovered a prior conveyance of a right-of-way to a third party during the title search preceding the closing, they could not have voided the contract. However, the fifth clause clearly does not entitle the Biggers to seek a right-of-way after the conveyance, nor does it invalidate the senior Biggers' conveyance of their easements and their "rights and interests" in Bent Branch Road and Wild Holly Lane.

Our construction of the fifth clause is consistent with the language of the contract as a whole. Of the twenty-three clauses in the contract, only two, the fifth and the ninth, make any reference to access and rights-of-way. The ninth clause lists additional representations and warranties. It reads, in pertinent part, as follows:

Sellers represent and warrant that . . . (vii) Buyers shall have reasonable access to and from the property from Carmel Road upon and over Bent Branch Road and Wild Holly Lane.

The ninth clause unambiguously warrants that the Evangelists will have "reasonable access." A conveyance of the Biggers' easements and "rights and interests" in Bent Branch Road and Wild Holly Lane fulfilled this warranty.

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We conclude that the provisions of the fifth clause are not specifically enforceable against the Evangelists. Under the terms of the contract, the Biggers *had the power* to expressly reserve a right-of-way in the deed before the conveyance, but they did not exercise it.

B.

The Second Contested Term—Property Description

The property to be conveyed was only described in the first clause of the contract. The trial court, after considering testimony on the parties' intent, concluded that the contract property description invalidated the conveyance of the full 60-foot width of Bent Branch Road for 187.59 feet in the metes and bounds deed description. Arguably, the contract property description may be ambiguous, and indeed, the trial court implicitly found it so, since it admitted extrinsic evidence of the parties' intent; however, we need not reach that question, because a subsequent unambiguous parol agreement modifying the contract property description controls.

1. Contract Property Description

The first clause of the contract read as follows:

The property which is the subject of this Contract is that certain property located in Charlotte, Mecklenburg County, North Carolina, fronting Bent Branch Road and Wild Holly Lane, on which property is located a lake, swimming pool, outbuildings, and a two-story brick and frame residence, all of which is shown on a boundary and physical survey of Carolina Surveyors, Inc. dated February 21, 1975, revised April 25, 1975, entitled "A Boundary-Physical Survey for Howard R. Biggers, Jr.," a copy of said survey being attached hereto as Exhibit "A" and incorporated herein by reference. The property contains a minimum of 9.432 acres of land and is outlined in red on Exhibit "A" attached hereto.

Thus, as suggested above, the first clause could be said to contain three property descriptions: (1) the unaltered survey, including the full 60-foot wide by 187.59 foot long strip of Bent Branch Road—9.4167 acres; (2) the raw acreage—9.432 acres; and (3) the red outlined survey, containing only a 30-foot wide strip of Bent

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Branch Road. Based on the first clause of the contract and the testimony of the parties' intent, the trial court concluded that the red-outlined description prevailed. However, included in the testimony and even cited in the trial court's findings of fact is evidence of a subsequent unambiguous parol agreement, which the trial court summarily dismissed as "unauthorized."

2. Subsequent Parol Agreement

[4] Evidence of the subsequent parol agreement is admissible to modify the terms of the written contract in the case. "The exclusion of parol evidence [under the parol evidence rule] on the theory that it is inadmissible to amend, vary or contradict a written instrument has no application to subsequent agreements which change or modify the original agreement." *Whitehurst v. FCX Fruit and Vegetable Svce, Inc.*, 224 N.C. 628, 636, 32 S.E. 2d 34, 39 (1944); *Hanover Co. v. Twisdale*, 42 N.C. App. 472, 256 S.E. 2d 840 (1979). The effect of a parol agreement, if its terms are unambiguous, is a question of law. *Patton v. Sinclair Lumber Co.*, 179 N.C. 103, 101 S.E. 613 (1919).

Originally, the Biggers' attorney submitted the written contract and the survey, Exhibit "A", to the Evangelists' attorney for his approval. The Evangelists' attorney drew the red line around the boundary of the property before the parties signed the contract. His red line varied from the actual metes and bounds description by only conveying a 30-foot wide strip of Bent Branch Road for 187.59 feet. The Evangelists' attorney also requested the inclusion in the special warranties clause of the contract that "(iv) the property contains a minimum of 9.432 acres of land. . . ." After the parties had signed the contract but prior to the closing, the Biggers' attorney drafted the deed description. Attached to the Evangelists' Answer is a letter from the Biggers' attorney to the Evangelists' attorney which reads, in pertinent part:

Enclosed is a proposed description for the Deed and Deed of Trust in regards to the Biggers-Evangelist closing. Would you review it and let me know if it meets with your approval? . . . You will note I have drawn the Deed to run to the southerly margin of Bent Branch Road and not as per your perimeter outline in red. This is a minor item, but it is for your client's benefit.

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The Evangelists' attorney testified that he agreed with the Biggers' attorney, that the proposed deed description contained in the letter would be used in the deed.

The terms of the above parol agreement are clear and unambiguous. The trial court, however, appeared to discount the agreement as an unauthorized action by the Biggers' attorney. The trial court found:

Upon the uncontradicted testimony of Mrs. Irene R. Biggers, when she 'signed the Deed,' she was not 'aware' that her and her husband's attorney, had ever 'written any such letter' and she had never authorized 'the writing of any such letter' nor had her husband ever indicated 'in any way that he had authorized such a letter.'

The Biggers do not contest their attorney's actual implied authority to negotiate the real estate transaction on their behalf. As their agent, the Biggers' attorney was acting within the scope of his actual authority, by meeting the conditions of the contract, when he drafted the deed description. Therefore, the Biggers are bound by their attorney's parol agreement made within the scope of his actual implied authority. *Investment Properties of Asheville, Inc. v. Allen*, 283 N.C. 277, 196 S.E. 2d 262 (1973).

The written contract contained a clause requiring that all amendments to the contract be in writing and signed by the parties. It is well-established, though, that a subsequent parol agreement or conduct which reasonably leads the other party to assume the contract provisions have been modified or waived is sufficient to modify or waive the provisions of a written contract, even when the contract stipulates that modifications must be in writing. *Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E. 2d 391 (1957); *Whitehurst v. W. E. Garrison Grading Co. v. Piracci Const. Co.*, 27 N.C. App. 725, 221 S.E. 2d 512 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976). In this case, there is both the subsequent parol agreement and suggestive conduct.

We conclude that the modification was effective; the deed description conveying the full 60-foot width of Bent Branch Road is valid.

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C.

In summary, the terms of the contract relied on by the Biggers are not specifically enforceable against the Evangelists. Even though the contract as a whole survived the closing: (1) the contract did not expressly reserve to the Biggers a right-of-way, (2) the right-of-way language in the contract does not void the provisions in the third paragraph of the deed, and (3) the property description, as modified, does not void the conveyance of the 60-foot wide strip of Bent Branch Road. Consequently, the original provisions of the deed remain in effect.

IV

[5] In addition to granting specific performance of the contract, the trial court concluded that the Biggers had established a right to implied easements arising from prior use for the benefit of all their remaining property. We affirm in part and reverse in part.

An implied easement arising from prior use requires proof of

(1) a separation of the title [to an estate]; (2) before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained.

Potter v. Potter, 251 N.C. 760, 764, 112 S.E. 2d 569, 572 (1960) (quoting *Bradley v. Bradley*, 245 N.C. 483, 486, 96 S.E. 2d 417, 420 (1957)); see generally 25 Am. Jur. 2d *Easements and Licenses* Secs. 27-33 (1966).

For an easement to be implied from prior use, the three prerequisites set forth in *Potter* must be met. The trial court concluded:

[L]aw and equity confer upon the Biggers in the present situation easements and rights-of-way by implication to use and travel upon Bent Branch Road and Wild Holly Lane for purposes of access to and from lands which they still own of the Biggers' original sixty-acre tract. The Biggers' use and need of these roads has been obvious and manifest for almost thirty years, and their continued right to travel upon such

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roads is necessary to their use and enjoyment of the lands remaining of their original tract.

The only element in dispute is the "long continued and obvious or manifest" use at the time of severance. All of the Biggers' remaining land, two 3-acre tracts, one 1.22-acre tract, and one 26-acre tract, is undeveloped. Therefore, the use of the roads must be judged accordingly. We conclude that the position of the plaintiffs' vacant land adjacent to the existing roads, is sufficient to establish obvious or manifest use by inference, in the absence of alternate access. According to the Mecklenburg County Tax Map in the record, one 3-acre tract fronts directly on Carmel Road and Bent Branch Road, and a second 3-acre tract fronts only on Bent Branch Road. The survey reveals that the 1.22-acre tract is at the end of Wild Holly Lane bordering on the Evangelists' driveway. Therefore, Bent Branch Road and Wild Holly Lane are the obvious or manifest means to reach the second 3-acre tract and the 1.22-acre tract. The survey further reveals that, at the time of the severance, neither Bent Branch Road nor Wild Holly Lane bordered on the 26-acre tract. The use of Bent Branch Road and Wild Holly Lane for the benefit of the vacant 26-acre tract was completely nonexistent.

The trial court erred in concluding that the first 3-acre tract and the 26-acre tract were entitled to implied easements arising from prior use. Only the second 3-acre tract and the 1.22-acre tract are entitled to implied easements arising from prior use.

V

In conclusion, we find that the original Biggers-Evangelist deed provisions remain in effect. Consequently, the Evangelists are the fee simple owners of the 60' by 187.59' section of Bent Branch Road and are entitled to the easements conveyed under the terms of the deed. Moreover, the Biggers are not entitled to a reserved right-of-way over Bent Branch Road and Wild Holly Lane. The contract terms relied on by the Biggers to void the various provisions of the deed discussed above and to reserve the right-of-way are not specifically enforceable against the Evangelists. Further, the Biggers are only entitled to implied easements over Bent Branch Road and Wild Holly Lane arising from prior use for the benefit of the second 3-acre tract and the 1.22-acre tract.

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We affirm as to the grant of implied easements for the benefit of the second 3-acre tract and the 1.22-acre tract. We reverse as to the specific performance of the contract, which, in essence, reforms the deed, and as to the grant of implied easements for the benefit of the first 3-acre tract and the 26-acre tract.

Affirmed in part; reversed and remanded in part.

Judges HILL and BRASWELL concur.

TIMOTHY ABELL AND DON A. REAMS v. THE NASH COUNTY BOARD OF
EDUCATION

No. 847SC91

(Filed 6 November 1984)

1. Schools § 13.1— refusal to rehire non-tenured teacher—recommendation by superintendent and principal—arbitrary or capricious reason

An arbitrary or capricious recommendation by a school superintendent or principal does not provide a board of education a valid basis for refusing to rehire a non-tenured teacher. Rather, G.S. 115C-325(m)(2) imposes a duty on boards of education to determine the substantive bases for recommendations of non-renewal of a probationary teacher's contract, and the board of education's records should reflect the specific substantive reason for non-renewal.

2. Schools § 13.1— refusal to rehire probationary teachers—summary judgment for school board improper

In an action by two probationary teachers seeking reinstatement to their teaching positions, summary judgment was improperly entered for defendant board of education where the board's forecast of evidence showed only that the school superintendent and school principal had recommended that plaintiffs not be rehired but failed to show any rational basis for such recommendation.

APPEAL by plaintiffs from *Barefoot, Judge*. Judgment entered 15 September 1983 in NASH County Superior Court. Heard in the Court of Appeals 23 October 1984.

Plaintiffs Reams and Abell were probationary teachers and assistant football coaches at Northern Nash High School (NNHS). Neither had ever received any criticism from their supervisors, and both consistently earned "satisfactory" evaluations during their two years at NNHS. At the end of the 1981-82 school year,

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both received letters informing them that the defendant Board of Education had decided not to renew their contracts for the 1982-83 school year. No reason was given in the letters. Plaintiffs inquired of their principal, but received no explanation why their contracts were not renewed. Having learned of nothing which would justify the Board's action, and otherwise believing that their performance as teachers had been more than adequate, plaintiffs filed suit for reinstatement, back pay, and actual and punitive damages. The Board moved for and obtained summary judgment, and plaintiffs appealed.

Thorp, Fuller & Slifkin, P.A., by James C. Fuller, Jr., and Chambers, Ferguson, Watt, Wallas & Adkins, P.A., by John W. Gresham, for plaintiffs.

Valentine, Adams, Lamar & Etheridge, by L. Wardlaw Lamar, for defendant.

WELLS, Judge.

Teachers in North Carolina are hired by local boards of education, upon the recommendation of their school superintendents. N.C. Gen. Stat. § 115C-299 (1983); see N.C. Gen. Stat. §§ 115C-35 to -48 (1983) (duties of boards); N.C. Gen. Stat. §§ 115C-271 to -278 (1983) (superintendents). Non-renewal of contracts of probationary teachers is governed by N.C. Gen. Stat. § 115C-325(m)(2) (1983), which provides:

The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons.

No statutory right of appeal exists. G.S. § 115C-325(n). Probationary teachers who contend non-renewal was for a prohibited reason therefore must sue in the appropriate court. *Sigmon v. Poe*, 528 F. 2d 311 (4th Cir. 1975) (per curiam). Plaintiffs did so, alleging that the Board's action was arbitrary and capricious; summary judgment was rendered against them.

A party moving for summary judgment may prevail if it meets the burden of proving an essential element of the opposing

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party's claim is nonexistent or by conclusively establishing a complete defense. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); *Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). If the moving party forecasts evidence which would entitle it to judgment as a matter of law, the non-moving party then must come forward with a forecast of evidence showing that a genuine issue of material fact exists for trial. *Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980). The non-movant may not rely on conclusory allegations unsupported by facts. *Lowe v. Bradford*, *supra*. The evidence must be considered in the light most favorable to the non-movant with all reasonable inferences therefrom. *Rose v. Guilford Co.*, 60 N.C. App. 170, 298 S.E. 2d 200 (1982).

[1] The Board's position is that it established a complete defense as a matter of law. It relies on our opinion in *Hasty v. Bellamy*, 44 N.C. App. 15, 260 S.E. 2d 135 (1979). There a probationary teacher's principal tried to get him to sign a letter which appeared to waive certain employment rights. When the teacher refused, the principal and the school superintendent recommended that the board not renew his contract. After non-renewal, the teacher sued and his complaint was dismissed; on appeal, we reversed:

From plaintiff's complaint, two possibilities appear: (1) the board failed to renew plaintiff's contract because he refused to sign the letter of condition, or (2) the board failed to renew plaintiff's contract because the principal and superintendent recommended that he not be rehired. If the latter were proved to be the case, no violation of . . . [G.S. § 115C-325(m)(2)] would be established, since the superintendent is entitled to make such recommendations, see . . . [G.S. § 115C-299; G.S. § 115C-325(m)(2)]; *Taylor v. Crisp*, 286 N.C. 488, 212 S.E. 2d 381 (1975), and *we do not find that the failure to renew plaintiff's contract based on the principal's recommendation would make the board's action arbitrary, capricious, or for personal reasons, in violation of the statute*. If the plaintiff were able to prove (1) above, however, we would reach a different result.

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Hasty v. Bellamy, supra, [emphasis added].¹ We went on to hold that plaintiff could pursue his claim that the failure to renew, if based *solely* on his refusal to sign the letter, was arbitrary and capricious. *Id.*

Relying on the emphasized language, defendant Board argues steadfastly that the superintendent and principal recommended that plaintiffs' contracts not be renewed, and that its action therefore was not arbitrary and capricious as a matter of law. The Board introduced minutes of the meeting at which the recommendation was made, with an attached list of teachers not offered renewal contracts. Plaintiffs were the only two teachers named thereon. The Board also introduced an uncontradicted affidavit from the superintendent that he had recommended plaintiffs not be reemployed. Defendant contends that applying *Hasty* literally, this evidence sufficed to establish a complete defense to plaintiffs' action.

It appears appropriate for us to clarify our opinion in *Hasty*. Obviously, we did not intend to take the position in *Hasty* that an arbitrary or capricious recommendation by a principal or superintendent would or could provide a school board with a valid basis for not rehiring a non-tenured teacher. To do so would not only unfairly insulate boards of education in such circumstances, but would invite arbitrary and capricious actions on the part of principals and superintendents, and would have the effect of rendering the prophylactic provisions of G.S. § 115C-325(m)(2) meaningless. We therefore modify it as discussed below.

It is elementary that a statute must be construed as a whole, giving effect if possible to every provision. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). A construction which will defeat or impair the object of a statute must be avoided if that can reasonably be done without violence to the legislative language. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). We will not adopt a construction of a statute which would effectively render it meaningless. *State v. Jones*, 67 N.C. App. 377, 313 S.E. 2d 808, *cert. denied*, --- N.C. ---, 315 S.E. 2d 699 (1984).

1. *Hasty v. Bellamy, supra* was decided prior to the recodification of Chapter 115 (to Chapter 115C) of the General Statutes. 1981 N.C. Sess. Laws, c. 423, s. 1. No change of the operative language occurred, however.

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The harsh effect of common law employee contract principles was demonstrated in *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). There our supreme court held that non-renewal of a teacher's contract lay entirely in the discretion of the board of education, rejecting summarily the plaintiff teacher's contention that the reasons given by the board were inadequate. Essentially, boards could refuse to renew for any reason or no reason at all. That same year the General Assembly changed the common law rule. 1971 N.C. Sess. Laws, c. 883.² The new law provided tenure for career teachers and listed the allowable reasons for their dismissal or demotion. And it contained the same language protecting probationary teachers now found at G.S. § 115C-325(m)(2). Clearly, the legislature intended to afford probationary teachers minimum protection against the arbitrary non-renewal permitted under the common law. The discretion of the boards with respect to probationary teachers remains very broad, of course, but the decision not to renew must have *some* non-arbitrary basis.

A school board may refuse to renew a probationary teacher's contract upon recommendation of the superintendent. That recommendation is only advisory, however; ultimate responsibility rests with the board. *Taylor v. Crisp*, *supra*. Applied literally, our decision in *Hasty* would allow the board to exercise its responsibility without regard to the limitations of G.S. § 115C-325(m)(2). As long as the superintendent actually recommended non-renewal, the board's action could never be arbitrary, even if the superintendent was simply relaying a recommendation based on no knowledge or based on personal ill-will. Such an interpretation effectively would render the proviso of G.S. § 115C-325(m)(2) meaningless, depriving probationary teachers of even the minimal legislative protection afforded thereby. It is therefore untenable.

Rather, we interpret G.S. § 115C-325(m)(2) to impose a duty on boards of education to determine the substantive bases for recommendations of non-renewal and to assure that non-renewal is not for a prohibited reason. The parties advance various elaborate tests for determining what is "arbitrary" or "capricious." Rather than further muddy the waters, we simply follow the general rule that "arbitrary" or "capricious" reasons are those without any rational basis in the record, such that a decision made thereon

2. See note 1, *supra*.

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amounts to an abuse of discretion. Black's Law Dictionary 96, 192 (5th ed. 1979); *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh. denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980); *In re Housing Authority*, 235 N.C. 463, 70 S.E. 2d 500 (1952). We hold that the advisory nature of the superintendent's recommendation to not rehire a non-tenured teacher places the responsibility on the Board to ascertain the rational basis for the recommendation before acting upon it.

The framework in which the recommendations are made supports this holding. Particularly in a larger school system, principals are charged with daily supervision and will be best acquainted with teachers' abilities and deficiencies. Superintendent's recommendations will ordinarily depend on the principals'. In the great majority of cases, the lay members of the board will undoubtedly follow the recommendation of these professionals. By statute, the superintendent is employed by the board and is responsible for carrying out its decisions. G.S. §§ 115C-276, -271. The principal is also employed by the board, reporting to both the superintendent and the board. G.S. §§ 115C-284, -286, -288. By statute and under traditional common-law principles, then, the superintendent and principal are agents of the board. The board cannot escape responsibility for its actions, based on the recommendations of its agents, by simply refusing to inquire into their agents' reasons. *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E. 2d 252 (1965); *see* Restatement (Second) of Agency § 212 (1958). The board, if it acts on recommendations made on improper grounds, must accept responsibility therefor. This does not mean that the board must make exhaustive inquiries or formal findings of fact, only that the administrative record, be it the personnel file, board minutes or recommendation memoranda, should disclose the basis for the board's action.

Recent decisions of the United States Supreme Court support our decision. In the landmark case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), that Court, as in the present case, was asked to review an informal administrative decision with no hearing record or other required formal presentation of facts. The Court held that ultimately the question before it was a narrow one, *i.e.*, whether the decision of the administrative agency was arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See* 5 U.S.C. § 706(2)(A) (1982).

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To enable a reviewing court to make such a determination, the court ruled, the administrative record must disclose what factors the administrator considered in reaching the decision. *See also Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281 (1974), *reh. denied*, 420 U.S. 956 (1975) ("arbitrary and capricious" standard) (decision upheld if agency's path in reaching it can reasonably be discerned from the record).

As noted above, we do not require that a formal order be prepared each time a board of education decides not to renew a probationary teacher's contract,³ but the board's records should reflect the specific substantive reason for the non-renewal of his contract. *See Dept. of Correction v. Gibson*, 308 N.C. 131, 301 S.E. 2d 78 (1983) (racial discrimination case) (burden to produce explanation on employer).

[2] With the foregoing principles in mind, we conclude that the present record does not justify summary judgment in favor of the defendant Board. As noted above, the Board, as movant, bore the burden of establishing a rational reason for its action. The Board offered only documents indicating that plaintiffs were recommended for cuts by the principal and the superintendent. One document, entitled "Worksheet" (author unknown), makes the following reference to plaintiff Reams: "Was tenured in Edgecombe Co. please keep him here!" Affidavits of the superintendent and plaintiffs' principal stated that neither had recommended plaintiffs for renewal, for reasons which "were substantial and were related to the educational process of the Nash County public schools." Plaintiffs submitted counter-affidavits to the effect that they had talked repeatedly to the principal, who had told them he had recommended that their contracts be renewed. The evidence regarding the recommendation of the principal, plaintiffs' direct supervisor, thus conflicted sharply, and the substantive reasons advanced by the two administrators are too vague and conclusory to justify summary judgment.

Some substantive evidence in the record indicates that positions at NNHS needed to be reduced by *three* from 52 to 49. No conclusive evidence was introduced to explain why only these two

3. A personnel file containing any material relevant to such decisions must be maintained in any event. G.S. § 115C-325(b).

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teachers were not renewed, out of seven originally recommended for non-renewal. On the present record, we must conclude that summary judgment was improperly granted to defendant Board.

We do not believe, as the Board contends, that our decision will result in a wave of litigation by disappointed teachers. Rather, it requires boards of education to be forthright about their actions. If a probationary teacher is not renewed, those who have made that decision simply must have a valid basis. On the present record, however, no such rational reason appears conclusively, and we accordingly reverse.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. SAMUEL J. CLARK, JR.

No. 8311SC1329

(Filed 6 November 1984)

1. Criminal Law § 163— necessity for recorded jury instruction conference

The trial court erred in failing to conduct a recorded jury instruction conference where defendant filed a written motion for an instruction conference and objected to the court's failure to do so. Former G.S. 15A-1231(b).

2. Narcotics § 1.3— possession of controlled substance—lesser offense of delivery

Possession of a controlled substance is a lesser included offense of delivery but not of sale of the controlled substance. G.S. 90-95.

3. Narcotics § 5— sale and delivery of narcotics—ambiguous verdict

A verdict finding defendant guilty of "selling or delivering marijuana" was inherently ambiguous since sale and delivery constitute two separate crimes.

4. Narcotics § 4.6— instructions on constructive possession

The trial court's instructions on constructive possession of marijuana were proper where the court required the State to show that defendant had the "right to exercise control or dominion" over the marijuana and that defendant placed or caused the marijuana to be placed on the hood of an undercover officer's automobile.

Judge ARNOLD concurring in part and dissenting in part.

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APPEAL by defendant from *Fountain, Judge*. Judgment entered 17 March 1983 in JOHNSTON County Superior Court. Heard in the Court of Appeals 20 September 1984.

Defendant was indicted for possession of a controlled substance with intent to sell and deliver, possession of a controlled substance, and sale and delivery of a controlled substance in violation of N.C. Gen. Stat. § 90-95 (Cum. Supp. 1983). Defendant was found guilty of sale or delivery of a controlled substance.

The State's evidence tended to show that on 1 April 1982, undercover State Bureau of Investigation Agent Mike Bustle went to a private residence in Clayton, North Carolina and purchased marijuana from defendant and co-defendant Frankie Clark. Agent Bustle solicited the sale from defendant outside the home. Defendant and Agent Bustle entered the home, defendant directing Agent Bustle to wait in a room containing at least seven individuals. Defendant exited and returned, directing Agent Bustle and co-defendant Frankie Clark into another room. Defendant told Agent Bustle to pay Frankie Clark and to look on the hood of Agent Bustle's car when he left. Agent Bustle complied and found a bag containing marijuana on the hood of his car.

Defendant's evidence tended to show that he did not live at the residence where Agent Bustle purchased the marijuana. Defendant denied any recollection of being at the residence and, if he was present, he did not meet Agent Bustle and had never met him prior to defendant's preliminary hearing.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Mast, Tew, Armstrong & Morris, P.A., by George B. Mast and John W. Morris, for defendant.

WELLS, Judge.

Defendant's primary assignments of error are that the trial court (1) failed to hold a jury instruction conference, (2) refused to instruct the jury on the charge of possession of a controlled substance as a lesser included offense of sale and delivery, and (3) incorrectly defined constructive possession to the jury. We find the trial court erred in failing to conduct an instruction conference and instructing the jury and submitting a verdict form

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that permitted an inherently ambiguous and fatally defective verdict of guilty of *sale or delivery* of a controlled substance.

[1] Defendant first assigns error to the trial court's failure to hold an instruction conference. On the first day of trial, defendant filed a motion for an instruction conference requesting submission of several pattern jury instructions. They were: burden of proof and reasonable doubt, credibility of witness, weight of the evidence, and possession of a controlled substance as a lesser included offense of possession of a controlled substance with intent to manufacture, sell, or deliver.

At the time of defendant's trial N.C. Gen. Stat. § 15A-1231(b) (1983) mandated:

On request of either party, the judge must, before the arguments to the jury, hold a recorded conference on instructions. . . . At the conference the judge must inform the parties of the offenses, lesser included offenses, . . . and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure . . . materially prejudiced the case of the defendant.

The first sentence was amended effective 28 June 1983 to read, "Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury."

Rule 21 of the General Rules of Practice for the Superior and District Courts requires:

At the close of the evidence . . . in every jury trial, civil and criminal, . . . the trial judge shall conduct a conference on instructions with the attorneys of record. . . . Such conference shall . . . be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys . . . to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instruc-

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tions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.

Our supreme court interpreted the statute and rule as requiring the trial court to hold an unrecorded conference in every case and a recorded conference when requested by either party. *State v. Bennett*, 308 N.C. 530, 302 S.E. 2d 786 (1983). We deem it appropriate to note at this point that G.S. §§ 15A-1231(d), -1446(d)(13), permitting appeal of instructions not objected to at trial, have been held invalid. *Id.*

Defendant's written motion for an instruction conference, mandated the trial court to conduct a recorded instruction conference under G.S. § 15A-1231(b). The trial court failed to hold either the recorded conference required by the statute or the unrecorded conference mandated under Rule 21. Defendant objected, as required by *State v. Bennett, supra*, to the trial court's failure to conduct the jury conference. We hold that the trial court's failure to hold a jury instruction conference requires a new trial.

[2] The next assignment of error we consider is whether possession of a controlled substance is a lesser included offense of sale and delivery of a controlled substance. Defendant's argument presents two questions for determination. First, whether possession of a controlled substance is a lesser included offense of either sale or delivery. Second, whether the trial court erred in instructing the jury on sale or delivery, in the disjunctive.

"When there is some evidence supporting a lesser included offense, defendant is entitled to a jury instruction thereon even in the absence of a specific request for such instructions." *State v. Chambers*, 53 N.C. App. 358, 280 S.E. 2d 636, *cert. denied*, 304 N.C. 197, 285 S.E. 2d 103 (1981). Instructing on any lesser included offense is mandatory and failure to instruct in appropriate factual situations is reversible error.

G.S. § 90-95(a)(1) establishes six separate crimes relating to controlled substances. They are: (1) manufacturing, (2) selling, (3) delivering, (4) possession with intent to manufacture, (5) possession with intent to sell, and (6) possession with intent to deliver a controlled substance. Selling and delivering are separate and distinct crimes. Possession of a controlled substance, if un-

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authorized, is a felony under G.S. § 90-95(a)(3). See *State v. Creason*, 68 N.C. App. 599, 315 S.E. 2d 540 (1984).

Within the context of G.S. § 90-95 possession of a controlled substance is a lesser included offense when a defendant is charged with an offense involving delivery. In *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974), defendant was charged with possession with intent to *deliver* a controlled substance. The supreme court, holding that possession was a lesser included offense, concluded that:

[O]ne may not possess a substance with intent to deliver it . . . without having possession thereof. Thus, possession is an element of possession with intent to deliver and the unauthorized possession is, of necessity, an offense included within the charge that the defendant did unlawfully possess with intent to deliver.

State v. Aiken, supra. While defendant Aiken was charged with possession with intent to deliver a controlled substance, the court's *ratio decidendi* as to the relationship between possession and delivery is controlling in the present case.

While possession of a controlled substance is a lesser included offense of delivery, the court in *Aiken* relying on *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973), held that the crime of possession is not a lesser included offense of selling a controlled substance. The court reasoned that:

[O]ne may unlawfully sell a controlled substance which he lawfully possesses. Furthermore, the sale of a substance is the passage of title thereto and while usually the seller of a controlled substance has possession thereof, actual or constructive, it is not necessarily so as a matter of law. One may sell an article or substance which he does not possess. . . . Thus, neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other.

State v. Aiken, supra.

[3] The interplay between possession as a lesser included offense of delivery but not sale presents the crucial question in this

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case. The trial court instructed the jury in the disjunctive that defendant could be found guilty if he "sold or delivered marijuana" and provided the jury with a verdict form that permitted defendant to be convicted of "selling or delivering marijuana."

In *Creason*, the jury returned a verdict of guilty of possession with intent to sell or deliver a controlled substance. We held that:

Since so far as the record shows, some jurors could have found defendant guilty of possessing the . . . [controlled substance] with intent to sell, while others could have found him guilty of possessing it with intent to deliver, and it does not positively appear, as our law requires, that all twelve jurors found him guilty of the same offense, the verdict is uncertain and therefore insufficient to support his conviction of either of the crimes charged.

State v. Creason, supra. [Citations omitted.] In *Creason*, we reversed the conviction and remanded to the trial court with instructions to enter judgment for possession of a controlled substance. Because we have ordered a new trial on other grounds the remedy fashioned in *Creason* is inappropriate in this case.¹ The record proper discloses that the verdict in this case was also in the disjunctive, and following *Creason*, we hold that it is inherently ambiguous and does not support the judgment.² The ambiguous verdict problem is further complicated by the lesser included offense instruction issue. In such cases where a verdict including delivery is submitted, it will be necessary for the court to instruct in connection with that verdict as to the lesser included offense of simple possession.

[4] The final assignment of error we consider is whether the trial court incorrectly instructed the jury on constructive possession. N.C. Gen. Stat. § 15A-1232 (1977) requires the trial court to

1. We also note that in reversing the trial court in *Creason* and remanding with instructions to enter a judgment for possession of a controlled substance, our decision may imply that possession is a lesser included offense of sale. To this extent, our decision in *Creason* is in conflict with *State v. Cameron, supra*.

2. We are aware that in *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, cert. denied, 312 N.C. 88, 321 S.E. 2d 907 (1984), a controlled substance case, another panel of this court apparently found no fault with similar disjunctive verdicts. The *Rozier* court did not mention or discuss *Creason*.

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correctly explain to the jury the law arising on the evidence given in the case. The jury charge must be construed contextually as a whole. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972).

The trial court charged that the jury could find defendant guilty of sale or delivery or not guilty. The pertinent instructions are:

[T]he statute [G.S. § 90-95] does provide that "deliver" or "delivery" means the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Now members of the jury, it is not required that the state show that the defendants owned any marijuana. . . . He may deliver something from one person to another that he does not actually own; however, for a person to deliver or sell anything, he must have at least actual possession of it, or constructive possession of it.

. . .

Constructive possession is not actual possession but it is the right to exercise control and dominion over the property.

. . .

Furthermore, to constitute a delivery it is not necessary that a person physically deliver property to another, and if the defendant . . . placed or caused to be placed marijuana on the hood of the automobile of Officer Bustle . . . then that would constitute a sale and delivery. . . .

Applying these standards to this case, the trial court properly instructed the jury as to constructive possession. Constructive possession is defined in this state as the *power and intent* to control disposition or use. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). In other words, to prove constructive possession the state had to show that defendant had the ability to control the marijuana and manifested that right of control. The trial court explained to the jury that it must find defendant had the "right to exercise control or dominion" and defendant "placed or caused to be placed the marijuana on the hood of the automobile of Officer Bustle." The trial court's explanation of the law fully complies

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with *State v. Harvey, supra*. This assignment of error is overruled.

We have carefully reviewed defendant's other assignments of error. Since we hold that a new trial is required and it is unlikely that any of these errors would occur at retrial, we do not address them.

New trial.

Judge HILL concurs.

Judge ARNOLD concurs in part and dissents in part.

Judge ARNOLD concurring in part and dissenting in part.

I am well aware that G.S. 7A-34 confers upon our Supreme Court the right to prescribe rules of practice and procedure for the trial courts which are supplementary to enactments of our General Assembly. I also understand that in *State v. Bennett, supra*, our Supreme Court ruled that pursuant to Rule 21 the trial court must hold an unrecorded instruction conference in every case.

Moreover, our Supreme Court in *Bennett* went on to say that the statute compels the trial judge to hold a recorded conference when requested by either party.

I do not believe, however, absent "plain error," in a case such as the one at bar where it would appear from the record that the trial judge committed no other error than failure to conduct the instruction conference, and further appearing that the defendant received as fair a trial as was humanly possible, that we should grant defendant a new trial because of the court's failure to hold the instruction conference. Respectfully, I therefore dissent from that part of this opinion awarding a new trial for failure to hold an instruction conference. I concur in the remainder of the opinion.

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STATE OF NORTH CAROLINA v. GEORGE HUGGINS

No. 8310SC1288

(Filed 6 November 1984)

1. Homicide § 21.7— second degree murder of a child—malice—sufficiency of the evidence

There was sufficient evidence of second degree murder to submit the charge to the jury and to support a conviction where defendant, a mature adult, intentionally struck a two and one-half year old child with a clenched fist as hard as one would hit an adult, thereby inflicting the proximate cause of the child's death. A sustained attack or pattern of abuse is not necessary to establish malice.

2. Homicide § 30.3— involuntary manslaughter—instruction on criminal negligence not required

Defendant was not entitled to a jury instruction on involuntary manslaughter based on criminal negligence where defendant's own testimony showed that he struck a child intentionally, and where the court instructed the jury on involuntary manslaughter based on an unintentional killing by an unlawful act not amounting to a felony.

APPEAL by defendant from *Bowen, Wiley, Judge*. Judgment entered 16 June 1983 in WAKE County Superior Court. Heard in the Court of Appeals 18 September 1984.

Defendant was indicted on 3 May 1982 for first degree murder in connection with the death of Leon Jermaine Stroud, age approximately two and one-half years, on 8 March 1982. The State proceeded upon second degree murder at trial. Defendant entered a plea of not guilty, was found guilty by the jury, and sentenced to 20 years imprisonment.

The State's evidence at trial tended to show that defendant had lived with Jeanette Stroud and her two children, Jermaine and Brandon Stroud, since July 1981. At approximately 11:30 a.m. on 8 March 1982, Barbara Moore, co-owner of the trailer park in which defendant resided, arrived at the trailer park and heard a loud noise. After entering the manager's office she heard noises again that sounded "like somebody fighting. It sounded like two people were pushing and shoving." Moore walked out of the office and determined that the noise was coming from defendant's unit and heard defendant "yelling" as she walked toward the unit. As Moore approached the unit, defendant ran outside toward another

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trailer stating that Jermaine was sick and he needed to get him to the hospital. Moore transported defendant and Jermaine to North Wake Hospital while defendant performed cardiopulmonary resuscitation on Jermaine.

Dr. James R. Mosley, Jermaine's attending physician at North Wake Hospital and Medical Examiner, thought Jermaine had a heartbeat upon arrival at the hospital, but no voluntary respiration. Jermaine died at approximately 12:30 p.m. Dr. Mosley questioned defendant as to the cause of Jermaine's injuries. Defendant recounted that he had been at the mailbox outside the home; that he reentered and discovered the child in the bathroom banging his head against the wall; and that the child fell on the floor, was without respiration, and defendant began mouth-to-mouth breathing.

In Dr. Mosley's expert medical opinion, Jermaine died of massive internal bleeding of the mesentery, right adrenal gland, small bowel, right lung and thymus resulting from a blunt trauma of substantial force. He stated that such force would be inconsistent with spontaneous hemorrhaging or cardiopulmonary resuscitation.

Dr. James R. Edwards, pathologist, performed an autopsy on the deceased child. His pertinent findings were that Jermaine suffered from three areas of trauma: (1) acute hemorrhage of the mesentery, right adrenal gland, small bowel, (2) right lung and thymus, and (3) cranial hemorrhaging on the top of the head. In Dr. Edwards' opinion, the cranial injury was caused by a mild to moderate amount of force and the injuries in the abdominal area were from moderate to severe force. Such injuries were inconsistent with an accidental injury. Dr. Edwards' diagnosis was that a "high index of suspicion of child abuse" caused the trauma and subsequent shock that killed the deceased.

Officer Kenneth G. Hensley, investigator with the Wake County Sheriff's Department, interviewed defendant concerning Jermaine's death. Defendant stated to him that he went a short distance outside the house for approximately fifteen minutes and was certain that no one else could have entered the unit during his absence. When defendant returned he discovered Jermaine on the bathroom floor having an apparent "fit" and began giving mouth-to-mouth resuscitation. Defendant stated that he had never

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spanked Jermaine with anything but his hand and had not struck or thrown him.

At the close of the State's evidence, defendant moved that the charge of second degree murder be dismissed. The motion was denied.

Jeanette Stroud, Jermaine's mother, testified for defendant. She stated that she and defendant lived together, defendant acted as a father to her children, and he had a good relationship with them. Her relationship with defendant was good before Jermaine's death and afterwards. On cross examination, Stroud stated that on 24 December 1981 defendant had bit the lip of her son, Brandon, with sufficient force to produce bleeding and subsequent swelling. She further testified that on one previous occasion defendant spanked the deceased for soiling his britches with such force as to leave marks on the buttocks.

Defendant testified in his own behalf that he had lived with Stroud, acted as a parent to the minor children, and had a caring relationship to both. As to the incident on 8 March 1982, he stated that Jermaine had soiled himself and that he had unbuttoned the child's pants and instructed him to go to the bathroom to clean himself. Defendant stepped outside to check his mailbox, entered into a discussion with a neighbor, checked the mailbox and returned inside. He stated:

So . . . I . . . walked through the living room to the bathroom, and . . . Jermaine was standing up and he had his hand pressed against the wall . . . and he turned around and looked at me and I don't know what happened, I exploded or whatever, but I hit Jermaine in the stomach and when I did, his legs went out from under him and he came down on his neck and back of his head.

Defendant described the force of the one blow with a clenched fist as "fairly hard" and "as hard as you would hit a grown man." Defendant attempted to resuscitate Jermaine, and with Barbara Moore transported Jermaine to the hospital.

At the close of all the evidence, defendant renewed his motion to dismiss. The motion was denied. The trial judge instructed the jury on second degree murder and involuntary manslaughter

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based upon doing a lawful act in an unlawful manner not amounting to a felony. Defendant was convicted and appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Purser, Cheshire, Manning & Parker, by Joseph B. Cheshire, V, and Barbara A. Smith, for defendant.

WELLS, Judge.

Defendant assigns error to the trial court in denying his motion to dismiss the charge of second degree murder because the evidence was insufficient and refusing to instruct the jury on the lesser included offense of involuntary manslaughter based on criminal negligence. We have reviewed defendant's assignments of error and find no error in defendant's trial.

[1] Defendant first contends that his motion to dismiss the second degree murder charge was improperly denied. He argues that the evidence does not support the essential element of malice required in second degree murder.

The rule by which the motion to dismiss must be evaluated by the trial court is well settled. It is:

The question for the court in ruling upon defendant's motion for dismissal is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If substantial evidence of both of the above has been presented at trial, the motion is properly denied. . . . In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. . . . Contradictions and discrepancies in the evidence are strictly for the jury to decide. . . .

State v. Lowery, 309 N.C. 763, 309 S.E. 2d 232 (1983) (citations omitted).

The court must also consider defendant's evidence which explains or clarifies that offered by the state. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971); *State v. Bruton*, 264 N.C. 488, 142

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S.E. 2d 169 (1965). It must consider defendant's evidence which negates an inference of guilt if it is consistent with the State's evidence. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983).

Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). Malice may be either express or implied. *Id.* It may be implied when there is:

[A]ny act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder. Such an act will always be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing.

State v. Wilkerson, 295 N.C. 559, 247 S.E. 2d 905 (1978) (quoting Sharp, C.J., dissenting in *State v. Wrenn*, *supra*).

Applying the above rules to this case, we hold that there was ample evidence to support the trial court submitting second degree murder to the jury and to support defendant's conviction. Defendant, a healthy adult male, admitted intentionally striking the deceased, an approximately two and one-half year old child, with a clenched fist as hard as one would hit an adult. Dr. Edwards testified that this trauma, resulting in massive internal bleeding and shock, was the proximate cause of Jermaine's death. The law in this state is that ordinarily:

[I]n a fight between men, the fist . . . would not . . . be regarded as endangering life or limb. But it is manifest, that a wilful blow with the fist of a strong man, on the head of an infant, or the stamping on its chest, producing death, would import malice from the nature of the injury, likely to ensue.

State v. West, 51 N.C. 505 (1859); *see also State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983); *State v. Sallie*, 13 N.C. App. 499, 186 S.E. 2d 667, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 900 (1972).

Defendant argues that in order to find malice there must have been a sustained attack or pattern of abuse, relying on,

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among others, *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979); *State v. Smith*, 61 N.C. App. 52, 300 S.E. 2d 403 (1983); and *State v. Sallie*, *supra*. These cases certainly establish that a sustained attack of short duration or sustained abuse, medically denoted as "battered child syndrome," that proximately causes death support a finding of malice. These cases, however, do not establish a minimum standard by which malice must be judged. We hold that where, nothing else appearing, a mature adult intentionally inflicts a blow or blows of such force on an infant which proximately causes death, such evidence is sufficient to establish the element of malice in second degree murder. This assignment of error is overruled.

[2] Defendant next contends that "the trial court erred in refusing to instruct the jury that they could find the defendant guilty of the lesser included offense of involuntary manslaughter if they found from the evidence that the defendant acted in a criminally negligent way and that such criminally negligent act proximately caused the victim's death." The trial court submitted to the jury the lesser included offense of involuntary manslaughter, instructing the jury:

Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony.

The trial court refused defendant's request that the remaining portion of the pattern jury instruction on involuntary manslaughter, providing that criminal negligence resulting in death may constitute involuntary manslaughter, be submitted to the jury and criminal negligence defined.

It is well established that the trial court must instruct the jury on all lesser included offenses of the crime charged when sufficient evidence exists from which the jury could find that offense was committed. *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981); *see also State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

Involuntary manslaughter has been defined as the "unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *State v. Wrenn*, *supra* (emphasis in original); *see also State v. Gerald*, *supra*. This crime arises under facts of an

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"unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Wilkerson, supra* (quoting *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963)). Defendant's own testimony shows conclusively that defendant struck Jermaine *intentionally*, albeit out of rage or temper. Such an intentional criminal act raised no issues of criminal negligence, and thus defendant was not entitled to have the jury consider a verdict based on his negligence. See *State v. Wilkerson, supra*. This assignment is overruled.

No error.

Judges ARNOLD and HILL concur.

ROSE MARIE LEDFORD SMITH, RITA CARDEN AND FRANCES W. LEDFORD
v. NATIONWIDE MUTUAL INSURANCE COMPANY AND SOUTH CARO-
LINA INSURANCE COMPANY

No. 8315SC1102

(Filed 6 November 1984)

1. Insurance § 95.1— automobile liability insurance— termination for nonpayment of premium—insufficient notice to insured

An "Expiration Notice" giving the insured an additional 16 day period beyond the termination date of an automobile liability policy in which he could pay the premium without an interruption in coverage was insufficient to permit defendant insurer to terminate the policy for nonpayment of premium since it failed to comply with the requirements of G.S. 20-310(f)(2) that the insured be given at least 15 days notice from the date of mailing or delivery rather than from the termination date, and the insured tendered the full amount of the premium within the required 15 day period, and since it failed to comply with the requirements of G.S. 20-310(f)(4) and (5) that the insured be advised of his right to request in writing a hearing and review from the Commissioner of Insurance and that the insured might be eligible for insurance through the North Carolina Automobile Insurance Plan.

2. Insurance § 95.1— automobile liability insurance— no refusal of renewal by insured

The "Premium Notice" and "Expiration Notice" mailed by an automobile liability insurer to the insured were not "manifestations of a willingness to

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renew" which were refused by the insured within the meaning of G.S. 20-310(g) so as to eliminate the necessity for compliance with the notice requirements of G.S. 20-310(f) in order for the insurer to refuse to renew the policy for nonpayment of premium.

APPEAL by defendant Nationwide Mutual Insurance Company from *McLelland, Judge*. Judgment entered 22 August 1983 in Superior Court, ORANGE County. Heard in the Court of Appeals 23 August 1984.

This is a civil action in which plaintiffs seek recovery from defendant Nationwide Mutual Insurance Company (Nationwide), based on a liability insurance policy, or in the alternative, from defendant South Carolina Insurance Company (South Carolina), based on an uninsured motorists policy.

On 8 October 1981, after a jury trial, judgment was entered against Nationwide's insured, Paul Allen Smith, based on a motor vehicle collision on 5 July 1979 involving his vehicle, operated by someone else with his permission, and a vehicle owned by plaintiff Ledford. The Ledford vehicle was being operated by plaintiff Smith. Plaintiff Carden was her passenger. Plaintiffs Smith and Carden were awarded damages in the amount of \$10,000 and \$1,500 respectively.

The judgment remained unsatisfied and plaintiffs made written demand for payment on 2 December 1981 pursuant to a liability insurance policy issued to Paul Allen Smith by Nationwide. Nationwide refused payment alleging that the automobile liability policy in question was not in effect at the time of the collision on 5 July 1979.

On 1 March 1982, South Carolina was notified that Nationwide's policy, issued to Paul Allen Smith, was not in effect at the time of the collision on 5 July 1979 and recovery was sought on an uninsured motorists policy issued to Ledford. South Carolina refused to pay alleging that Nationwide's policy issued to Paul Allen Smith was in full force and effect on 5 July 1979.

Plaintiffs filed this action on 2 July 1982 and both defendants moved for summary judgment.

The trial court held that the coverage afforded by Nationwide's policy of automobile liability insurance on the Paul Smith

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vehicle was in full force and effect at the time of the collision on 5 July 1979 and that the uninsured motorists provisions of South Carolina's policy issued to Ledford were not applicable. Summary judgment was entered for South Carolina. Defendant Nationwide appeals.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Douglas Hargrave, for plaintiff-appellees.

Moore, Ragsdale, Liggett, Ray and Foley, by Peter M. Foley and Kurt E. Lindquist, II, for Nationwide Mutual Insurance Company, defendant-appellant.

Holt, Spencer, Longest and Wall, by James C. Spencer, Jr., for South Carolina Insurance Company, defendant-appellee.

EAGLES, Judge.

The main issue presented on appeal is whether, notwithstanding the language of G.S. 20-310(g), Nationwide must comply with the mandate of G.S. 20-310(f) when it declines to renew an automobile liability insurance policy for nonpayment of premium after mailing to its insured a "Premium Notice" and an "Expiration Notice." The plaintiffs contend that on 5 July 1979 the insurance policy issued by Nationwide was still in full force and effect as a matter of law because Nationwide had failed to comply with the requirements of G.S. 20-310(f) relating to cancellation or refusal to renew for nonpayment of premium. We agree.

Nationwide first assigns as error the trial court's granting of South Carolina's motion for summary judgment on the issue of Nationwide's liability under the automobile liability insurance policy issued to Paul Allen Smith.

Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mutual Life Insurance Company*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The goal of this procedural device is to allow disposition before trial of an unfounded claim or defense. *Asheville Contracting Company v. City of Wilson*, 62 N.C. App. 329, 303 S.E. 2d 365 (1983).

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The undisputed facts are that: On 27 February 1979, defendant Nationwide issued to Paul Allen Smith its policy of automobile liability insurance numbered 61E686567 with a policy period from 22 February 1979 to 22 June 1979. On 1 June 1979 Nationwide mailed a document entitled "Premium Notice" through the United States mail, first class postage, to Paul Allen Smith at his home address. On 27 June 1979, Nationwide mailed a document entitled "Expiration Notice" through the United States mail, first class postage, to Paul Allen Smith at his home address. Neither of the two documents so mailed was returned to Nationwide as undelivered. On 5 July 1979, the Smith vehicle described in the Nationwide policy of insurance was involved in a collision in Orange County, North Carolina.

The trial court, in its summary judgment order filed 6 September 1983, found that there was no genuine issue as to any material fact with respect to the insurance coverage for the Paul Allen Smith vehicle, a 1969 Chrysler, and that the coverage afforded by Nationwide was in full force and effect on the date of the collision, 5 July 1979.

The deposition of Ann Amos, supervisor of Nationwide's data entry department in Raleigh, tends to show and Nationwide's brief states, that the policy in question was terminated by Nationwide for failure to pay the premium.

It is clear from the "Premium Notice" mailed 1 June 1979 and the "Expiration Notice" mailed 27 June 1979, that the policy in question would have been renewed by Nationwide if the premium had been paid in full by the deadline set in the "Expiration Notice."

The original policy listed an expiration date of 22 June 1979 and the "Expiration Notice," mailed on 27 June 1979, purported to grant Paul Allen Smith an additional 16 day period beyond 22 June 1979 in which he could pay his premium without an interruption in coverage. When full payment was not received during this additional 16 day period, Nationwide terminated the policy. The basis for Nationwide's failure to renew was nonpayment of premium.

[1] Before an insurer may cancel or refuse to renew a policy of automobile liability insurance for failure to pay a premium due,

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the insurer must follow the provisions of G.S. 20-310 and G.S. 20-309(e). *Nationwide Mutual Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E. 2d 601 (1970).

The pertinent part of G.S. 20-310 is found in subsection (f) which provides:

(f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:

(1) Be approved as to form by the Commissioner of Insurance prior to use;

(2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be 15 days from the date of mailing or delivery when it is being canceled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;

(3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;

(4) Advise the insured of his right to request in writing, within 10 days of the receipt of the notice, that the Commissioner of Insurance review the action of the insurer; and the insured's right to request in writing, within 10 days of receipt of the notice, a hearing before the Commissioner of Insurance;

(5) Either in the notice or in an accompanying statement advise the insured of his possible eligibility for insurance through the North Carolina Automobile Insurance Plan; and that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specifying the penalties for such violation.

G.S. 20-310(f)(2) refers to subdivision (e)(4) of this same statute which states:

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(e) No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons . . . (4) The named insured fails to discharge when due any of his obligations in connection with the payment of premiums for the policy or any installment thereof.

Thus, all of the provisions of G.S. 20-310(f) must be complied with before an insurer may refuse to renew an insurance policy pursuant to G.S. 20-310(e)(4). Compliance means substantial compliance with G.S. 20-310 in order for an insurer to effectively cancel (or fail to renew) an automobile liability policy for non-payment of premium. In the instant case, Nationwide failed to substantially comply with the statute's requirements.

Here, Nationwide by the terms of its "Expiration Notice" mailed 27 June 1979 purports to grant its insured 16 days from the date of expiration, 22 June 1979, within which to pay his premium for semi-annual renewal. The clear implication of the "Expiration Notice" is that if payment is not received, Nationwide will not renew. The "Expiration Notice" falls short of substantial compliance with G.S. 20-310(f) in several respects.

G.S. 20-310(f)(2) requires at least 15 days notice *from the date of mailing or delivery* when insurance is being cancelled or not renewed for failure to pay a premium due. Here, the date of mailing is stipulated by the parties as 27 June 1979. The minimum notice required by G.S. 20-310(f)(2) was not met. If the requirements of G.S. 20-310(f)(2) had been met by the "Expiration Notice," the insured would have had until 12 July 1979 to pay his premium and have his policy renewed. For the purposes of the summary judgment motion, Nationwide stipulated that its insured, Paul Allen Smith, tendered partial payment of the premium on 6 July 1979 and a check for the full amount of the premium on 11 July 1979, both of which were refused by Nationwide. The tender of the full amount was within the required period of notice under G.S. 20-310(f)(2).

In addition, the "Expiration Notice" did not comply with G.S. 20-310(f)(4) and (5). These provisions require the insurer to advise the insured of his right to request in writing a hearing and review from the Commissioner of Insurance and that the insured may be eligible for insurance through the North Carolina Automobile Insurance Plan. For these reasons, the trial court was

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correct in concluding that the policy of insurance issued by Nationwide to Paul Allen Smith was in full force and effect on 5 July 1979.

[2] Nationwide argues that it did not have to comply with G.S. 20-310(f) because of the language contained in G.S. 20-310(g). We disagree.

G.S. 20-310(g) states:

Nothing in this section will apply:

- (1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention by any other means;
- (2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be cancelled or that he does not wish the policy to be renewed;
- (3) To any policy of automobile insurance which has been in effect less than 60 days, unless it is a renewal policy, or to any policy which has been written or written and renewed for a consecutive period of 48 months or longer.

Nationwide urges that it manifested its willingness to renew in the form of a "Premium Notice" and "Expiration Notice" since both contain the words "Semi-Annual Renewal" and that a lapse in coverage occurred when its insured refused Nationwide's offer. However, Nationwide has stipulated that the insured tendered partial payment on 6 July 1979 and a check for full payment on 11 July 1979. This is clearly inconsistent with the contention that the insured intended to refuse Nationwide's offer. On the contrary, the two tenders indicate a persistent attempt by the insured to renew the policy in question.

If we were to adopt the construction of G.S. 20-310(g) urged by Nationwide, it would render meaningless the protection offered to the motoring public by G.S. 20-310(f). We do not believe the legislature intended such a result.

We hold that in this case the "Premium Notice" and "Expiration Notice" were not "manifestations of a willingness to renew" which were refused by the insured. Neither were they effective

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notice of refusal to renew by the insurer as required by G.S. 20-310(f).

Nationwide's assigned error on the issue of punitive damages is not properly before us, there being no final order of the trial court from which to appeal.

Affirmed.

Judges ARNOLD and WHICHARD concur.

ESSIE S. AMEY v. RUTH P. AMEY

No. 8314DC1157

(Filed 6 November 1984)

1. Appeal and Error § 20— interlocutory appeal—discretionary review

Where an appeal was interlocutory, but the parties were bogged in a procedural morass and a district court order substantially affected the procedural and substantive rights of defendant, the Court of Appeals treated the appeal as a petition for certiorari and granted the petition in the interest of the expeditious administration of justice.

2. Courts § 14.1; Ejectment § 2— motion to transfer—summary ejectment—waiver of right to hearing in district court

In a summary ejectment action, defendant waived her right to have her motion to transfer heard by a superior court judge, and was estopped to question the district court's authority to consider the motion, where defendant's attorney noticed the hearing on the motion in district court, did not object to the district court hearing the motion, and objected to the proceedings in district court only in her brief on appeal and then only to the sequence in which motions were heard. G.S. 7A-258(b) and (c).

3. Courts § 14.1— pending motion to transfer— involuntary dismissal—error

The district court erred by granting plaintiff's motions to strike defendant's answer and to dismiss her counterclaims, and by reassigning the case to the magistrate, before ruling on defendant's prior motion to transfer. G.S. 7A-258(f).

4. Courts §§ 4, 14.1— amount in controversy in excess of \$10,000—transferred to superior court

The district court erred in denying defendant's motion to transfer to superior court on the merits where defendant's answer alleged an amount in controversy in excess of \$10,000. G.S. 7A-243.

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5. Ejectment § 1.3— summary ejectment—issue of title raised by defendant's answer

In an action for summary ejectment, the district court erred in concluding that there was no genuine issue of title, and in striking the answer, dismissing the counterclaim, and remanding the matter to the magistrate, where defendant's answer specifically denied the existence of a lease and where the magistrate had transferred the matter under G.S. 7A-223 because he found that the pleadings raised an issue of title.

Judge HEDRICK dissenting.

APPEAL by defendant from *LaBarre, Judge*. Order entered 20 September 1983 in District Court, DURHAM County. Heard in the Court of Appeals 18 September 1984.

Everett & Hancock, by Kathrine R. Everett, for plaintiff appellee.

Thomas H. Stark, for defendant appellant.

JOHNSON, Judge.

I

Finding that "no genuine issue of title" existed and, thus, avoiding a mammoth procedural maze, the district court judge reached a straightforward substantive result in this summary ejectment action—he struck defendant's answer, dismissed her counterclaims, remanded the action to the magistrate, and denied her motion for a transfer of the action to the superior court division. Defendant appeals, and we reverse.

For clarity, however, we outline the procedural morass before giving our analysis.

On 26 July 1983, the plaintiff, Essie Amey, filed an action in summary ejectment, seeking to remove her daughter-in-law, the defendant, Ruth Amey, from possession of one-half of a two-family dwelling. The Complaint alleged that the defendant had entered into possession as a lessee under a written lease executed in September 1981, and that the defendant had failed to pay rent since October of that year, leaving a balance due of \$4,725.00.

On 4 August 1983, the defendant filed an Answer in which she not only denied the allegations of the Complaint, but also set forth various defenses, four counterclaims, a jury demand, and a

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motion that the estate of her deceased husband, William Amey, Jr., be joined as a party in the proceeding. More specifically, the defendant (1) moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; (2) moved to transfer the action to the superior court division; (3) counterclaimed for a parol resulting trust in one-half of the property, and in the one-half remainder following the life estate of the plaintiff; (4) counterclaimed for a constructive trust; and (5) counterclaimed for damages based upon contract theories. On 4 August 1983, the magistrate moved the case to district court pursuant to N.C. Gen. Stat. Sec. 7A-223 (1981) based on the issue of title raised by defendant in her Answer. Thereafter, on 23 August 1983, plaintiff moved to strike the first two defenses of the Answer pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure, to dismiss the counterclaims pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, and to strike the demand for jury trial. Plaintiff's motion was based on her assertion that since her action for summary ejectment was based on a lease, the defendant, as lessee, was "estopped from contesting the title, since [defendant had] herself recognized the title by executing the lease as tenant."

Pursuant to notice given by both parties, a hearing was held on 20 September 1983 on plaintiff's various motions and on defendant's motion to remove the action to the superior court division. The district court judge considered all motions at one hearing, and determined first, that no genuine issue of title was involved. The judge then struck the Answer, dismissed the counterclaims, remanded the matter to the magistrate, and, finally, denied defendant's motion to transfer the action to the superior court division.

II

In her first series of arguments, defendant asks us to remand this matter to superior court because (1) the district court had no authority to consider the issue of transferability since the motion to transfer should have been "heard and determined by a judge of the superior court division whether the case [was] pending in that division or not." N.C. Gen. Stat. Sec. 7A-258(b) (1981); (2) even if the district court was authorized to decide the issue of transferability, "its refusal to decide [the] motion to transfer . . . prior to

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ruling on [plaintiff's] substantive motions" to strike and to dismiss was error; and (3) even if the district court could have considered the merits of the action it erroneously denied defendant's motion to transfer when, as here, defendant's Answer alleged an amount in controversy in excess of \$10,000. In her closely related second series of arguments, defendant contends the district court erred in striking her Answer, dismissing her counterclaims, and remanding the matter to the magistrate, when: (1) the motion to transfer was pending; (2) the Answer presented meritorious defenses; (3) the counterclaims raised well-pleaded claims; and (4) an unresolved issue of title was raised by the pleadings.

III

[1] The appeal in this case is interlocutory; however, because the parties are so bogged in a procedural morass and because the district court's order so substantially affects procedural and substantive rights of the defendant, we treat the appeal as a petition for writ of certiorari, and grant same. On the facts of this case, the following quote from our Supreme Court suffices:

Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment [citations omitted]. However, the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose. [Citations omitted.]

Stanback v. Stanback, 287 N.C. 448, 453, 215 S.E. 2d 30, 34 (1975).

IV

We now address the issues raised by defendant *seriatim*.

A. The Authority of the District Court to Consider the Motion to Transfer

G.S. Sec. 7A-258(b) (1981) provides as follows:

A motion to transfer is filed in the action or proceeding sought to be transferred, but it is heard and determined by a judge of the superior court division whether the case is pend-

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ing in that division or not. A regular resident superior court judge of the district in which the action or proceeding is pending, any special superior court judge residing in the district, or any superior court judge presiding over any courts of the district may hear and determine such motion. The motion is heard and determined within the district, except by consent of the parties.

[2] This statute unquestionably imposes upon superior court judges the responsibility of considering motions to transfer. The right to transfer, however, may be waived by consent or by failure to move for transfer within the prescribed time limits. See *Stanback v. Stanback*; G.S. Sec. 7A-258(c) (1981).

On the facts of this case, we find that defendant waived her right to have the motion to transfer heard by a superior court judge, and she is estopped to question the district court judge's authority to consider the motion. It was defendant's attorney who noticed the hearing on the motion to transfer in district court. Further, defendant concedes in her brief "that her counsel, by calendaring the motion before the district court, did not assist the court in accurate resolution of the issue." Moreover, the record does not reflect that defendant ever objected to the district court hearing the motion. Indeed, the only objection to the proceedings in district court (and, significantly, it is found in the brief and not in the record) is to the sequence or order in which the district court judge heard the motions. That is, defendant states in her brief, that the trial court refused to consider the motion to transfer *prior* to ruling on plaintiff's motions. We reject defendant's attempt to attack the district court judge's authority to decide the very question which defendant submitted to him.

B. The Necessity to Rule First on Defendant's Motion to Transfer

[3] We agree with defendant that the district court erred when it considered plaintiff's substantive, and subsequently filed, motions before ruling on defendant's earlier filed motion to transfer. Critical to this issue is the legislature's directive for proceedings pending disposition of a motion to transfer. Under G.S. Sec. 7A-258(f) (1981), "[t]he filing of a motion to transfer does not stay further proceedings in the case except that: (1) involuntary dismissal is not ordered while a motion to transfer is pending;

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[and] (2) assignment to a magistrate is not ordered while a motion to transfer is pending. . . ." By striking the Answer and dismissing the counterclaims under Rule 12(b)(6), the district court, in effect, entered two "involuntary dismissals" in this action. *See Mazingo v. N.C.N.B.*, 31 N.C. App. 157, 229 S.E. 2d 57 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E. 2d 204 (1977).

Although the record is not as helpful as it could be on this point, the language of the court's order itself suggests that each of the dismissals was entered prior to the court ruling on the motion to transfer. This, the court did not have authority to do. Similarly, the reassignment of the case to the magistrate also disregards the statutory directives of G.S. Sec. 7A-258(f) (1981).

C. Denial of Defendant's Motion to Transfer on the Merits

[4] The district court erred in denying defendant's motion to transfer on the merits. Defendant's Answer alleged an amount in controversy in excess of \$10,000. As stated in defendant's brief: "The first two counterclaims alternatively seek an interest in real property alleged by the motion to transfer to be worth in excess of \$10,000. The second counterclaim, also in the alternative, seeks \$50,000 as the liquid value of the one-half interest sought. The third and fourth counterclaim, on alternative grounds, seek recovery of an additional \$120,000." In denying defendant's motion to transfer in the face of allegations of an amount in controversy in excess of \$10,000, the district court failed to follow N.C. Gen. Stat. Sec. 7A-243 (Supp. 1983), which, in relevant part, states that:

[t]he superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars (\$10,000).

For purposes of determining the amount in controversy, the following rules apply whether the relief prayed is monetary or non-monetary, or both, and with respect to claims asserted by complaint, *counterclaim*, cross-complaint, or third party complaint:

V

[5] It is not necessary to fully address defendant's second series of arguments that the district court erred when it concluded that

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there was no genuine issue of title; when it struck the Answer; when it dismissed the counterclaims; and when it remanded the matter to the magistrate. To the extent the trial court's order is based upon its assumption that the defendant entered into possession of the premises as a lessee, under a written lease, and that therefore no issue of title existed, it was erroneous, considering the pleadings. Defendant, in her Answer, specifically denies the existence of a lease, written or otherwise. We find that both the Answer and the counterclaims create a genuine issue of title. It is not without significance that the magistrate transferred the matter to the district court under G.S. Sec. 7A-223 (1981) because he found that the pleadings raised an issue of title.

Having previously determined, in subsection IV-B, *supra*, that the trial court erred in ruling on plaintiff's substantive motions at a time when defendant's motion to transfer was pending, and having summarily concluded that the answer presented meritorious defenses, that the counterclaims raise well-pleaded claims, and that the remand to the magistrate was improper, we

Reverse.

Judge PHILLIPS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

Since the appeal is clearly from an interlocutory order that does not, in my opinion, affect a substantial right within the meaning of *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983), I vote to dismiss the appeal. The fact that the parties are "bogged in a procedural morass" which the trial court has attempted to avoid by "reach[ing] a straightforward substantive result" is insufficient reason for this Court to exercise our discretion and pass on the merits of the case. I believe the potential harm of ruling on this fragmentary and premature appeal far outweighs the benefits to be gained by the appellate court's attempts to "teach school" in this case.

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STATE OF NORTH CAROLINA v. BRUCE EDWARD GILLIAM

No. 8321SC1206

(Filed 6 November 1984)

1. Criminal Law § 66.5— lack of counsel at lineup—no prejudice

There was no prejudice from defendant's participation in a pretrial lineup without counsel where the witness could not make a pretrial or in-court identification of defendant. Furthermore, defendant was detained only as a "suspect," and it is well established that the right to counsel does not attach until judicial criminal proceedings have been initiated.

2. Searches and Seizures § 8— warrantless arrest—prior detention by private citizen—evidence admissible

In a prosecution for armed robbery of a convenience store, there was no error from the admission of evidence seized from defendant's person after he was detained by a private citizen because the officer who arrested defendant had probable cause for the arrest. The search was therefore incident to a lawful arrest and not to the detention of defendant by a civilian or to information provided by the civilian. G.S. 15A-404.

3. Searches and Seizures § 7— search before formal arrest—incident to arrest

A search of a suspect before formal arrest is incident to the arrest when probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish probable cause.

4. Criminal Law § 90.2— State's impeachment of own witness—no voir dire—no prejudice

There was no prejudice from the court's failure to conduct a *voir dire* before allowing the State to impeach its own witness where the State was clearly surprised by testimony favorable to defendant. The witness testified that he had never had any conversation with the district attorney about the case; that he had not talked to any law enforcement official about the case except immediately after his arrest, when he gave the prior inconsistent statement; and that, just prior to defendant's case being called, he had pled guilty and his attorney had advised the court of a circumstance set forth in the prior statement.

5. Criminal Law § 90.2— impeachment of own witness—correct procedure

Although a trial court's failure to conduct a *voir dire* hearing before allowing the State to impeach its own witness was held nonprejudicial, it is strongly emphasized that the trial courts should follow the procedure set forth in *State v. Pope*, 287 N.C. 505.

6. Criminal Law § 122.1— refusal to allow testimony to be read to the jury during deliberations—no abuse of discretion

The trial court did not abuse its discretion by refusing to allow the testimony of two witnesses to be read to the jury as requested by the jury during deliberations. G.S. 15A-1233(a).

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APPEAL by defendant from *Graham, Judge*. Judgment entered 14 December 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 August 1984.

On 14 December 1978, defendant was convicted of armed robbery and sentenced to twenty years. No appeal was taken. Defendant filed several post conviction motions in the trial court which were denied. On 27 July 1982, defendant filed a petition for Writ of Habeas Corpus in the United States District Court for the Middle District of North Carolina. On 26 April 1983, the United States District Court entered judgment directing the State of North Carolina to either vacate and set aside defendant's conviction or afford him the right to a belated appeal in that the record discloses a "real possibility of impeachment of the State's witness by the prosecuting attorney contrary to the laws of the State of North Carolina." Defendant's Petition for Writ of Certiorari to this Court was granted 15 August 1983.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Evelyn M. Coman, for the State.

Laurel O. Boyles, for defendant appellant.

JOHNSON, Judge.

The State offered evidence tending to show that on 18 August 1978, at approximately 2:30 a.m., defendant, Bruce Edward Gilliam, and Ralph Cunningham robbed the Pantry Food Store on Lewisville-Clemmons Road, Clemmons, North Carolina. Defendant was wearing blue jeans, a t-shirt and a green jacket. Cunningham was also wearing blue jeans. When defendant and Cunningham entered the Pantry, Cunningham pointed a .45 caliber automatic pistol at the cashier, Elizabeth Boyd, and ordered her to open the cash register. Defendant took \$69.00 from the cash register.

The defendant offered testimony tending to show that he accompanied Cunningham into the store but had no prior knowledge that a robbery was to occur; that when he got inside the store Cunningham pulled the pistol on the clerk ordering her to the floor and then ordered defendant to take the money from the cash register. Defendant testified further that he did not willingly participate in the armed robbery and did so only at the direct

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insistence of the co-defendant Cunningham and in fear of his personal safety because of the gun being held by Cunningham.

We set forth other pertinent evidence in the body of the opinion as we discuss the issues.

[1] Defendant contends that he was required to participate in a pretrial lineup without the assistance of counsel. This assignment of error is without merit. First, defendant does not contend or argue that he was prejudiced in any manner by being placed in a pretrial lineup, nor does the record reveal any prejudice. The record reveals that the clerk, Elizabeth Boyd, was unable to make either a pretrial or in-court identification of defendant. Second, it is well established that a person's right to counsel does not attach until judicial criminal proceedings have been initiated, *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972), whether by formal charge, preliminary hearing, indictment, information or arraignment. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). In the case at bar, the evidence shows that at the time Ms. Boyd viewed the defendant he was being detained as a "suspect." Again, and more importantly, Ms. Boyd was unable to make a pretrial or in-court identification of the defendant.

[2] By his second assignment of error, defendant contends the trial court erred in allowing the State to introduce evidence seized from the person of defendant pursuant to an alleged illegal arrest.

Timothy Wooten, a civilian, testified as follows. On 18 August 1978, approximately 2:30 a.m., he saw a brown color Vega automobile parked behind the Pantry Food Store on Lewisville-Clemmons Road. One man was standing in front of the Vega while another was getting into it. Shortly thereafter, Officer J. D. Pitman advised him that the Pantry had been robbed. He again saw the brown Vega traveling approximately two miles from the Pantry. He commenced following the Vega in order to keep it in sight and to obtain the license tag number. He used his citizen band radio and advised Officer Pitman of his pursuit and location. After following the Vega for some distance, it stopped and the driver, Ralph Cunningham, stepped out and started walking toward Wooten's car which he stopped approximately two car lengths behind the Vega. Defendant was seated in the front passenger's seat and two other subjects were seated in the back

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seat of the Vega. As Cunningham walked toward him, he told Cunningham to stop and to place his hands on the car where he could see them. Cunningham complied. Defendant and the other passengers started to exit the car. He told them to also place their hands on the car where he could see them. As defendant stepped from the car, he threw something underneath the car. Defendant and the other two passengers then assumed the same position as Cunningham, where all four remained until Officer R. D. Krupel arrived.

Officer R. D. Krupel testified that shortly after the robbery, he arrived at the Pantry Store and interviewed Ms. Boyd who advised him that the two robbers were white males; that each was wearing blue jeans, and one was also wearing a blue shirt and a green jacket. While at the Pantry, Officer Krupel was also advised that the brown Vega had been sighted and was stopped approximately three miles from the Pantry. Upon arriving at the location where the Vega had stopped, Officer Krupel observed four men standing next to it. Defendant was wearing blue jeans, a dark t-shirt and a green jacket. Officer Krupel also saw a .45 caliber automatic pistol and numerous dollar bills on the floorboard of the Vega, and numerous dollar bills scattered on the highway beneath the Vega. Upon searching defendant, Officer Krupel found a large roll of dollar bills in the pocket of defendant's green jacket.

Defendant argues that he was improperly detained by Mr. Wooten, a private person, and held by him until Officer Krupel arrived. Therefore, argues defendant, the subsequent arrest and search of defendant by Officer Krupel were illegal and evidence obtained from that search was inadmissible. Defendant relies upon G.S. 15A-404 which states in pertinent part that a private person may detain another person when he has probable cause to believe that the person detained has committed in his presence a felony, a breach of the peace, a crime involving physical injury to another person, or a crime involving theft or destruction of property. Defendant contends that Mr. Wooten did not have probable cause to believe that defendant committed a crime in his presence and, therefore, he had no right to detain him until the officer arrived.

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We do not find it necessary for proper disposition of this assignment of error to decide whether defendant was improperly detained by Mr. Wooten. Prior to searching defendant, Officer Krupel had received a brief description of the robbers and information that the brown Vega was parked behind the Pantry around the time the robbery was committed. Upon arriving at the location where the Vega had stopped and before searching defendant, Officer Krupel saw the .45 caliber automatic pistol and numerous dollar bills scattered on the floorboard of the car. He also observed numerous dollar bills scattered underneath the car where defendant threw something upon stepping from the Vega. He also noticed that defendant was wearing blue jeans and a t-shirt and a green jacket. This evidence clearly shows that Officer Krupel had probable cause to arrest defendant for the robbery and that the search of defendant's person was therefore incident to the lawful arrest made by Officer Krupel and not pursuant to a detention of the defendant or information provided by Mr. Wooten, a civilian.

[3] Although we are unable to tell from the record before us whether Officer Krupel's search of defendant was before or after formal arrest, our holding would be the same even if the search occurred before formal arrest. This Court has held that a search of a suspect before formal arrest is incident to the arrest when probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish probable cause. *State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977). In the case at bar, the evidence seized from defendant's person was not necessary to establish probable cause for defendant's arrest. The other evidence set forth was adequate to establish probable cause prior to a search of defendant. *Compare, State v. White*, 25 N.C. App. 398, 213 S.E. 2d 394, *cert. denied*, 287 N.C. 468, 215 S.E. 2d 628 (1975). Defendant's assignment of error is without merit.

[4, 5] Defendant contends the trial court erred in allowing the State to impeach its own witness, Ralph Cunningham.

On direct examination, Ralph Cunningham testified that he and defendant entered the store together and while he held the gun on the clerk defendant removed the money from the cash register. When asked if defendant voluntarily took the money from

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the cash register, Cunningham stated that he "more or less" made defendant take the money by grabbing defendant by the arm, pushing defendant to the cash register and telling defendant to take the money. Over defendant's objection, the State was allowed to examine Cunningham about a written statement Cunningham had given to law enforcement officers shortly after being arrested. The statement tends to contradict Cunningham's trial testimony which tends to indicate that defendant did not voluntarily participate in the robbery by taking the money, but did so only because defendant made him do it. In the written statement, Cunningham stated that defendant wanted him to kill the clerk; that when he and defendant ran from the store, defendant took the gun and wanted to return to the store to kill the clerk, but that he took the gun away from defendant. Further, that while they were driving away from the store, defendant grabbed the gun and told Cunningham to stop the car so that he could shoot the motorist who was following them.

As a general rule, a district attorney may not impeach a State's witness by evidence of prior statements inconsistent with or contradictory of his testimony. *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973). However, in *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975), the Court recognized an exception to this general rule. In *Pope*, the Court held that where the State has been misled and surprised by a witness whose testimony as to a material fact is contrary to what the State had a right to expect, the State is permitted to impeach the witness by proof of his prior inconsistent statements. *Id.* at 512, 215 S.E. 2d at 144. However, before the State is allowed to impeach the witness, the trial court is required to conduct a *voir dire* hearing to determine that the State has been misled and surprised by the witness' testimony as to a material fact. *Id.* at 513, 215 S.E. 2d at 145.

Although the trial court, in the case at bar, erred in failing to conduct the required *voir dire* hearing, *State v. Pope, supra*, we hold that it was nonprejudicial in light of the uncontradicted evidence of the record which shows that the State was in fact misled and surprised by Cunningham's testimony which tended to negate defendant's voluntary participation in the robbery. Cunningham testified that he has never had any conversation with the district attorney about the case; that he had not talked to any law enforcement official about the case except immediately after

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his arrest at which time he gave the prior inconsistent statement; and that just prior to defendant's case being called for trial, he (Cunningham) pled guilty to his involvement in the robbery and his attorney advised the trial court that he (Cunningham) had prevented defendant from returning to the Pantry to kill Ms. Boyd. It is clear from the record that the district attorney, in calling Cunningham as a witness, was relying upon these facts, was expecting Cunningham to give favorable testimony to the State's contentions and was surprised when Cunningham gave testimony tending to negate defendant's voluntary participation in the robbery. This assignment of error is without merit. Although we hold that the trial court's failure to conduct a *voir dire* hearing was nonprejudicial, we strongly reemphasize that the trial courts should follow the procedure set forth in *Pope*.

[6] Defendant contends the trial court erred in not allowing the testimony of two witnesses to be read to the jury as requested by the jury during its deliberations.

Defendant concedes in his brief that it is within the sound discretion of the trial judge to direct that requested parts of the testimony be read to the jury. G.S. 15A-1233(a). Judge Graham explained to the jury that to do so might "possibly highlight or spotlight a particular portion of the evidence." There was no abuse of discretion. *Compare, State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6 (1980).

We have carefully examined defendant's remaining assignments of error and find each to be without merit.

In the trial of defendant's case we find no prejudicial error.

No error.

Judges WEBB and PHILLIPS concur.

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STATE OF NORTH CAROLINA v. REGINALD JOHNSON

No. 8426SC127

(Filed 6 November 1984)

Criminal Law §§ 74.3, 92.1— admission of confessions by nontestifying codefendants—right of confrontation—consolidated trial

Defendant's right of confrontation was not violated by the admission of a nontestifying codefendant's sanitized confession where all explicit references to defendant were omitted and only oblique references to an unknown "he" remained, and where there were no circumstances which would allow the jury readily to infer that defendant was implicitly incriminated by the codefendant's statements. Defendant waived his right to protest the admissibility of a second codefendant's sanitized confession by failing to object thereto at the trial. Therefore, defendant was not deprived of his right to a fair trial by the consolidation of defendant's trial with that of his two codefendants because the codefendants had made confessions which incriminated him.

APPEAL by defendant from *Allen (C. Walter), Judge*. Judgment entered 26 July 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1984.

Defendant and two others were indicted 11 April 1983 for felonious breaking and entering in violation of G.S. 14-54(a). Prior to trial, the State's motion for the joinder of all defendants was granted pursuant to G.S. 15A-926. Defendant was found guilty and sentenced to a term of five years imprisonment.

The State's evidence tends to show that Reginald Johnson (defendant), Ricky Crawford (Crawford) and Reginald Robert Johnson (R. R. Johnson) participated in the breaking and entering of a Charlotte residence. On the morning of 22 December 1982, Charlotte Police Officer M. D. DeLuca responded to a burglar alarm at the home of Lula Hargett. As he approached the rear of the house, Officer DeLuca saw that a windowpane had been removed, a rear porch door was ajar and that a second door leading from the porch into the kitchen was open. The officer radioed for assistance, heard muffled voices within the house and started to enter. As he did so, defendant, wearing white tube socks over his hands, came out of the kitchen towards him. Defendant was immediately arrested.

After two other officers arrived at the scene, Crawford entered the kitchen, scuffled with Officer E. R. Green, and was also arrested.

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The officers secured the suspects and searched the rest of the house. They discovered open dresser drawers from which clothing had been pulled and tossed to the floor. In the den they found an open gun cabinet, an air rifle propped on a chair and a stereo console pulled away from a wall. The owner testified that these conditions were not as she had left them nor had she given defendants permission to enter the house.

The State tendered a pretrial motion to consolidate the trials of defendant, Crawford and R. R. Johnson, a third man suspected of being the lookout for defendant and Crawford. Defendant protested on the grounds that both codefendants had made statements allegedly incriminating him. The Court, however, approved of efforts to remove all references to defendant within the statements and granted the State's motion for joinder.

At trial, neither of defendant's codefendants testified, yet versions of their post-arrest statements were introduced. R. R. Johnson signed the following statement which was admitted without objection:

I was lookout man when the pink house on Belvedere Avenue was broken into. I did not go into the house. I yelled into the house when the police came up the driveway. Then I ran into the woods. Officer Cessena is writing this for me.

Later, defendant did object to the introduction of codefendant Crawford's statement. The trial court overruled the objection but did instruct the jury that Crawford's statement was not applicable to either defendant or R. R. Johnson and had no bearing on the guilt or innocence of either. Crawford's statement included the following pertinent material:

He told me that he had been looking around that big house and that he thought they could get a lot out of it. He also said the house had signs about a burglar alarm but he didn't think they worked. I left and I didn't think any more about it until about 9:00 when I was walking down The Plaza and went to the house I had been told about. It was a big pink house in that rich section on The Plaza. Anyway, when I got to the house, I rang the doorbell and no one was home, so a window was taken off by the door. . . .

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Defendant presented no evidence, was found guilty and now appeals.

Attorney General Edmisten, by Isham B. Hudson, Jr., Special Deputy Attorney General, for the State.

Grant Smithson, for defendant appellant.

VAUGHN, Chief Judge.

The sole question presented on appeal is whether defendant was deprived of his right to a fair trial by the joinder of two co-defendants and the subsequent admission of edited extrajudicial statements made by nontestifying codefendants Crawford and R. R. Johnson. Defendant claims that the statements incriminated him and were thereby admitted in violation of his right of cross examination as guaranteed by the Sixth Amendment's Confrontation Clause.

Generally, it is within the sound discretion of the trial court whether multiple defendants, jointly indicted, should be tried jointly or separately. Absent a showing that a defendant was denied a fair trial, the Court's exercise of discretion will not be disturbed on appeal. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Freeman*, 31 N.C. App. 335, 229 S.E. 2d 238 (1976); see G.S. 15A-926 and G.S. 15A-927. It is accepted, however, that prejudicial error may be created by the admission of incriminating statements, competent against a nontestifying declarant but inadmissible against a codefendant referred to therein. As noted in the seminal case of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), "[a] jury cannot 'segregate evidence into separate intellectual boxes.' . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." *Id.* at 131 (quoting *People v. Aranda*, 63 Cal. 2d 518, 529, 407 P. 2d 265, 272 (1965)). As a result, instructions to the jury that a confession or statement is admissible only against the declarant, however clear, are an ineffective substitute for a defendant's constitutional right of confrontation. "The effect is the same as if there had been no [limiting] instruction at all." *Id.* at 137. All extrajudicial confessions must therefore be excluded from joint trials unless all incriminating references to defend-

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ants other than the declarant can be deleted without prejudice to both the State and the declarant. *Fox, supra*. As subsequently codified at G.S. 15A-927(c)(1), the rule is as follows:

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant.

Defendant contends that the statement of codefendant Crawford incriminates him. It is "[t]he *sine qua non* for [the] application of *Bruton* [and *Fox*] . . . that the party claiming incrimination without confrontation at least be incriminated." *State v. Jones*, 280 N.C. 322, 340, 185 S.E. 2d 858, 869 (1972). We disagree with defendant and find that the State adequately "sanitized" Crawford's statement. All explicit references to defendant were omitted and only oblique references to an unknown "he" remained. A statement may indicate that the declarant had an accomplice so long as the identity of that accomplice is in no way indicated. *Freeman, supra*. Nor do we find this to be a case where general references to unnamed third persons invite the jury to improperly infer that the declarant's codefendants were the subjects of his statement. For example, in *State v. Gonzalez*, 311 N.C. 80, 316 S.E. 2d 229 (1984), our Supreme Court held that the admission of a nontestifying codefendant's sanitized statement inferentially and impermissibly implicated his two codefendants. When apprehended as a robbery suspect, the declarant asserted that "I told him I was with some guys, but that I didn't rob anyone, they did." *Id.* at 92, 316 S.E. 2d at 236. The *Gonzalez* Court held that the statement "clearly implicated" the petitioner because two codefendants were being tried jointly with the declarant and because only two persons were seen at the time and

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place of the robbery. *Id.* at 94, 316 S.E. 2d at 237. *Gonzalez* therefore suggests that the proper rule in North Carolina requires an analysis of both the content and context in which a statement is reported to the jury. *Bruton* must be satisfied regardless of whether a statement is inculpatory standing alone. *Accord, U.S. v. DiGilio*, 538 F. 2d 972, 983 (3d Cir. 1976), *cert. denied sub nom. Lupo v. U.S.*, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed. 2d 749 (1977); *contra, U.S. v. Slocum*, 695 F. 2d 650, 655-56 (2d Cir. 1982), *cert. denied*, 460 U.S. 1015, 103 S.Ct. 1260, 75 L.Ed. 2d 487 (1983). See also *State v. Porter*, 303 N.C. 680, 695, 281 S.E. 2d 377, 387 (1981).

In the present case defendant asserts that Crawford's statement, coupled with evidence of defendant's presence inside the victim's residence, persuaded the jury to assume that defendant entered the house with felonious intent. We cannot agree. There are no circumstances which would allow the jury to readily infer that defendant was implicitly incriminated by Crawford's admission. First of all, the statement never states that "he" entered the house or actually participated in the burglary. Moreover, "he" obviously refers to a single person and Crawford was indicted and tried with two others. Assuming *arguendo*, that the jury believed "he" referred to one of Crawford's codefendants, there is nothing within the statement itself nor contained within other evidence presented that would suggest which, if any, codefendant may have been prejudiced.

Finally, any potential error was rendered harmless by the introduction of independent evidence which clearly established defendant's criminal intent. *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972). Defendant was not given permission to enter the house. Entrance was gained by the breaking of a window and several objects of value were disturbed within. Defendant was apprehended inside the house with a pair of tube socks over his hands. Defendant's criminal intent may clearly be inferred from these circumstances. *State v. Oakley*, 210 N.C. 206, 186 S.E. 244 (1936); *State v. Hill*, 38 N.C. App. 75, 247 S.E. 2d 295 (1978).

Defendant argues that he was similarly implicated by the out-of-court statement of codefendant R. R. Johnson. Defendant did not, however, object to the admission of this sanitized confession during the trial. It is elementary that the admission of in-

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competent evidence is no basis for a new trial where there was no objection at the time the evidence was presented. *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968). "An assertion . . . by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule." *State v. Mitchell*, 276 N.C. 404, 410, 172 S.E. 2d 527, 530 (1970). The record reveals that defendant was aware of the State's intent to introduce the confessions and of the proposed sanitized versions at the State's pretrial motion for consolidation. We believe defendant had more than adequate notice of both proposed statements. By failing to object to the first, defendant effectively waived the right to protest its alleged inadmissibility. See, e.g., *Gonzalez, supra* (waiver by failing to object held invalid in view of insufficient notice before introduction at trial).

Defendant has failed to show that he was prejudiced by the joinder of codefendants Crawford and R. R. Johnson. The trial court's exercise of discretion will therefore not be disturbed on appeal.

No error.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. TREVOR DALE GURGANUS AND LINDA
STAPLES GURGANUS

No. 841SC184

(Filed 6 November 1984)

1. Judgments § 2— denial of motion to dismiss for double jeopardy—order entered out of session

In an action for illegal alcohol sale and gambling violations, a superior court order finding no double jeopardy and remanding the case to district court was without authority and void where the hearing in superior court was conducted during the 15 August session of criminal superior court, the order was entered 11 October and filed with the Clerk's office on 20 October, and the record contains no stipulation allowing a ruling out of session.

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2. Courts § 7.1— district court denial of motion to dismiss for double jeopardy— appeal to superior court—scope of review

Where a finding of no double jeopardy is appealed from district to superior court, the scope of review in superior court is a *de novo* evidentiary hearing on double jeopardy, and not a trial on the merits. G.S. 15A-1432; G.S. 15A-1445(a).

3. Criminal Law § 148.1— right to immediate appeal of superior court ruling on motion to dismiss for double jeopardy

Where a superior court finding of no double jeopardy was remanded to superior court for a *de novo* consideration of the issue, it was noted that a defendant has no right to appeal an interlocutory order denying his motion to dismiss for double jeopardy prior to being put on trial a second time. However, a judgment on double jeopardy adverse to the State would be a final judgment which could be immediately appealed. G.S. 15A-1431(b); G.S. 15A-1445.

Judge WEBB concurring.

APPEAL by defendant from *Phillips, Judge*. Order entered 11 October 1983, in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 17 October 1984.

Attorney General Rufus L. Edmisten by Assistant Attorney General David Roy Blackwell for the State.

Trimpi, Thompson & Nash by C. Everett Thompson for defendant appellants.

BRASWELL, Judge.

The whole of this appeal concerns: (1) whether the Superior Court was without authority to sign its order in this matter out of session; (2) whether the Superior Court's review of a motion to dismiss for former jeopardy by the State from District Court is *de novo*; and (3) whether the defendants were placed in former jeopardy when they were recharged in District Court with crimes that the State had previously voluntarily dismissed in District Court. After a consideration of the following, we hold that the Superior Court order is a nullity and remand this cause to the Superior Court for a new hearing on the question of double jeopardy. Because the issue of the Superior Court's scope of review of the District Court order may recur on remand, we have chosen to briefly address it.

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Trevor Gurganus was charged with two violations of illegal alcohol sale and two gambling law violations. Linda Gurganus was charged with one count of illegal alcohol sale. The defendants were summoned to District Court on 12 May 1983 to answer the charges.

As is the custom in District Court, the defendants were asked during the calendar call what they intended to plead. They answered, "not guilty." When their case was finally called to trial, the State entered a voluntary dismissal to all the charges against the Gurganuses.

The defendants were recharged with these crimes by identical criminal process and were summoned to District Court again on 21 July 1983. The defendants moved that these charges be dismissed on the grounds that the defendants had been twice placed in jeopardy for the same offenses. District Court Judge Richard Parker found facts and concluded as a matter of law that the defendants had been previously charged and arraigned for the same offenses and that since they had already been placed in jeopardy once, were now entitled to a dismissal of the charges.

The State appealed the dismissal to Superior Court. In a *de novo* hearing on the double jeopardy issue, Superior Court Judge Herbert O. Phillips, III, received evidence, found facts of his own, and concluded as a matter of law that jeopardy had not attached in this cause during the first District Court proceeding and remanded the case for a determination of these charges on the merits. From this order, the defendants have appealed to this Court.

[1] The present disposition of this case turns on whether the Superior Court Judge had authority to sign and enter its order dated 11 October 1983. According to *State v. Boone*, 310 N.C. 284, 287, 311 S.E. 2d 552, 555 (1984), "an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held." Otherwise, such orders are null and void and of no legal effect. The hearing on the State's appeal was conducted during the 15 August 1983 Session of Pasquotank Criminal Superior Court. Judge Phillips' order was entered 11 October 1983 and filed with the Clerk's office on 20 October 1983. Thus, the order was entered out of session. The record contains no stipulation

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allowing a ruling out of session and no indication that Judge Phillips ruled in open court. The State's brief concedes that *Boone* is controlling, and, in effect, concedes error. We hold therefore that Judge Phillips' order is void. We must remand this case to Superior Court for a new hearing. As a result, the parties are once again in the positions they found themselves after the State's appeal from the entry of Judge Parker's order.

[2] Because this case has been remanded for a new determination in Superior Court, it is incumbent on this Court to clarify the scope of review the Superior Court must use. G.S. 15A-1432 states in pertinent part:

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

* * * *

(b) When the State appeals pursuant to subsection (a) the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

(c) The motion may be heard by any judge of superior court having authority for the trial of criminal cases in the district. The State and the defendant are entitled to file briefs and are entitled to adequate time for their preparation, consonant with the expeditious handling of the appeal.

(d) If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error, it must reinstate the charges and remand the matter to district court for further proceedings.

The defendants argue that implicit in G.S. 15A-1432 is the concept that the Superior Court Judge, by reviewing the actions and the order of the District Court Judge, is acting as an appellate court. Because the statute requires the Superior Court Judge to take the lower court's order into account, the State's appeal in Superior Court, according to the defendants, is not *de novo*, meaning

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that the Superior Court Judge is bound by the facts found by the District Court if supported by any competent evidence. A further basis for their belief is the fact that the language of G.S. 15A-1432(a) is identical to that found in G.S. 15A-1445(a), the statutory basis of appeals by the State from the Superior Court to the appellate division, and that G.S. 15A-1432(c) specifically provides that the State and the defendant are entitled to file briefs.

Nevertheless, District Criminal Courts are not courts of record. There would be no method for determining whether the findings of fact in the District Court order were supported by "any competent evidence," the applicable standard of the Superior Court if acting as an appellate court. Therefore, in many instances an evidentiary hearing may be the only method by which the Superior Court Judge can carry out the mandate of G.S. 15A-1432(d) and (e) and determine whether the District Court ruling was proper. Also, the "Official Commentary" to G.S. 15A-1432 states that "[t]his section creates a simplified motion practice for the State's appeal in such circumstances," which further indicates that the hearing in Superior Court must be an evidentiary one, and not merely a forum for oral argument even though opportunity to file briefs must be given before ruling. Even though the wording of G.S. 15A-1432(a) and 15A-1445(a) are identical, the reviewing role of the appellate courts and the Superior Court must differ because of the differing practice (i.e., no record and no opportunity for the settlement of that record from the District Court to the Superior Court) between the courts.

While we reject the notion that the scope of review of the Superior Court under G.S. 15A-1432 is that of an appellate court, we recognize that the appropriate review on the State's appeal is not *de novo* in the sense that it is provided to the defendant under G.S. 15A-1431. In the State's appeal under G.S. 15A-1432, the hearing in Superior Court is limited to a *de novo* review of the District Court's order dismissing criminal charges against a defendant or granting a motion for a new trial based on newly discovered evidence. In the case at hand, the State received, and was only entitled to hearing *de novo* on the issue of whether the second prosecution of the charges by the State was barred by double jeopardy. G.S. 15A-1432 does not provide the State with the opportunity for a trial *de novo* on the merits.

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Having decided that the Superior Court order in this case is void, the issue of whether or not the defendants were placed in former jeopardy by the reinstitution of the charges against them is not properly before us. The record clearly indicates that the State properly followed the procedure for taking its appeal set out in G.S. 15A-1432(b). We therefore remand this case to the Superior Court for a new hearing on the single issue of double jeopardy wherein the next Superior Court Judge may make his own findings of fact as well as his conclusions of law after a *de novo* evidentiary hearing.

[3] We call to the parties' attention the case of *State v. Jones*, 67 N.C. App. 413, 313 S.E. 2d 264 (1984). While *Jones* is factually distinguishable in that all the proceedings in *Jones* were within one division of the General Court of Justice, the Superior Court, the precept of law that a defendant has no right to appeal an interlocutory order denying his motion to dismiss on the grounds of double jeopardy prior to being put on trial a second time remains fully applicable here. If on remand the Superior Court Judge fails to find double jeopardy, and remands for trial in District Court, the defendant must await his trial in District Court. If convicted in District Court, he would be entitled to appeal to Superior Court for a trial *de novo* under G.S. 15A-1431(b). If the State loses in Superior Court on remand from us, the State would have the right to appeal immediately under the provisions of G.S. 15A-1445. As to the State, an adverse judgment in Superior Court on double jeopardy would be an appeal from a final, not interlocutory, order or judgment depriving it of a substantial right which it would lose if not reviewed forthwith.

Vacated and remanded.

Judge EAGLES concurs.

Judge WEBB concurs in result.

Judge WEBB concurring.

I concur with the majority in returning the case to the Superior Court. I would do so, however, by dismissing the appeal with an order to the Superior Court to remand the case to District Court for trial. I believe that *State v. Jones*, 67 N.C. App.

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413, 313 S.E. 2d 264 (1984) requires the appeal to be dismissed as interlocutory. I do not believe the distinction between *Jones* and this case relied on by the majority is sufficient to keep *Jones* from being a precedent for this case.

DANIEL F. HALL v. T. L. KEMP JEWELRY, INCORPORATED

No. 8415DC53

(Filed 6 November 1984)

1. Sales § 5.1; Uniform Commercial Code § 11— sale of bracelet—no express warranty

Defendant jeweler did not expressly warrant the value of a bracelet sold to plaintiff when he proceeded with the transaction after plaintiff stated, "If I have \$2,000.00 worth of jewelry, let's wrap it up," or when he gave plaintiff a written appraisal of the bracelet for insurance purposes after the sale was consummated. G.S. 25-2-313.

2. Fraud § 3.2— opinion as to value—no fraud

Defendant jeweler's representation as to the value of a bracelet sold to plaintiff was nothing more than an opinion and did not constitute actionable fraud.

3. Unfair Competition § 1— representations as to value—no unfair trade practice

Defendant jeweler's oral representations and written appraisal of the value of a bracelet sold to plaintiff did not constitute an unfair or deceptive trade practice under G.S. 75-1.1.

APPEAL by plaintiff from *Hunt, Judge*. Judgment entered 11 July 1983 in District Court, ORANGE County. Heard in the Court of Appeals 18 October 1984.

This is a civil action wherein plaintiff seeks compensatory, treble and punitive damages for defendant's alleged breach of express warranty, fraudulent misrepresentation and unfair and deceptive trade practices. The claim arises out of a transaction between the parties in which plaintiff purchased a 14 karat gold seven inch rope bracelet with diamonds and emeralds for \$1,976.00 from defendant jewelry store.

Defendant answered denying the charges and moved for summary judgment. The trial court heard the motion on 11 July 1983

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and granted it as to all counts. From entry of summary judgment for defendant, plaintiff appeals.

Dailey J. Derr, for plaintiff appellant.

Jordan, Brown, Price and Wall, by Charles Gordon Brown and Jeff Mason, for defendant appellee.

HILL, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of the defendant. Summary judgment is proper if the pleadings, depositions, interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56. An appeals court uses a two-pronged analysis to determine if entry of summary judgment is proper: (1) is there a genuine issue of material fact, and (2) is the movant entitled to judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). To establish the first prong, the court must look at the record in the light most favorable to the party opposing the motion, in this case the plaintiff. *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972). The second prong of the test requires that the evidence which is offered in support of the motion be examined in light of the substantive rules of law as they relate to plaintiff's claim for relief. *Johnson, supra*.

No genuine issue of material fact remains between the parties. The record viewed in the light most favorable to plaintiff tends to establish: On 25 May 1982, plaintiff went into T. L. Kemp Jewelry Store in Chapel Hill to look for an anniversary present for his wife. Plaintiff had recently moved from Ohio to the area. His family had not yet joined him. Plaintiff expressed an interest in a gold bracelet with diamonds and emeralds marked for sale at \$2,650. Apparently defendant and plaintiff discussed the price at that time but he left the store without making a purchase. Sometime before 28 May 1982, plaintiff telephoned the store owner and asked if "he had any room in his price" for the bracelet. Defendant said no. On 28 May 1982, plaintiff returned to the jewelry store where he purchased the bracelet for \$1,900.00 plus \$76.00 tax.

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During his negotiations with defendant, plaintiff explained that he was accustomed to buying his fine jewelry through a wholesaler and thus was inexperienced in dealing with a retail jeweler. Plaintiff indicated that he was aware of a dollar difference between wholesale and retail prices but he expressed a willingness to pay the difference so long as the value of the jewelry was commensurate with the purchase price. The owner assured the plaintiff that the gold and stones were of "excellent quality." Plaintiff said, "If I have \$2,000.00 worth of jewelry, let's wrap it up."

While the bracelet was being gift wrapped, plaintiff asked defendant to supply an appraisal of the bracelet suitable for insurance purposes. The defendant responded that he would supply the appraisal for insurance purposes only and that it would provide for adequate replacement coverage. Defendant later sent an appraisal dated 5 June 1982 to plaintiff which stated that the bracelet had a value of \$2,650.

Plaintiff paid for his purchase with his American Express Card. He intended to take the bracelet back with him to Ohio and present it to his wife on 31 May 1982, their anniversary. Because he was unsure if the bracelet would be acceptable to his wife, plaintiff requested that defendant delay submission to American Express of the charge slip signed by him on 28 May 1982, until 31 May 1982, the day he intended to present the gift to his wife. Plaintiff said that if defendant did not hear from him on 31 May 1982, he should submit the charge to American Express. Because the bracelet was acceptable to his wife, plaintiff did not contact defendant who therefore submitted the charge slip to American Express.

The bracelet was in the jewelry store on consignment for Sarah Terhune. On 11 June 1982, defendant gave Ms. Terhune a check for \$1,320.00, her share of the sale price.

On 19 June 1982, plaintiff's wife got a second appraisal of the bracelet from a Maryland firm with whom plaintiff had previously dealt. That appraisal valued the bracelet at \$900.00. Disappointed in the disparity between the appraisal value and the sum he had paid for the bracelet, on 31 July 1982 plaintiff presented the second appraisal and the bracelet to defendant and asked for his money back. Defendant offered to accept the returned bracelet in

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exchange for a store credit, but he refused to refund the purchase price in cash. The store had a posted policy of no cash refunds. The exchange offered was unacceptable to plaintiff. Sometime later, defendant obtained a third appraisal from a Durham jeweler who valued the bracelet at \$595.00. The parties were unable to resolve their dispute and plaintiff filed the present action on 18 February 1983.

Defendant does not dispute any of the foregoing facts which were presented by the plaintiff. Our inquiry now turns to a consideration of rules of law as they relate to the plaintiff's claim for relief.

[1] Plaintiff first claims that defendant is liable for damages caused by the breach of an express warranty under G.S. 25-2-313. Plaintiff claims the express warranties to him were created when defendant gave him assurances as to the value of the bracelet he purchased for \$1,976.00. Prior to his final decision to purchase the jewelry, plaintiff said: "If I have \$2,000.00 worth of jewelry, let's wrap it up." In response defendant proceeded with the transaction presumably affirming the statement made by plaintiff. In addition, plaintiff claims assurances as to value were offered by the appraisal requested by him after the sale was consummated and while the bracelet was being gift wrapped. Defendant subsequently sent the appraisal, dated more than a week after the transaction, to the plaintiff.

In order to overcome a motion for summary judgment as to this issue the plaintiff must present evidence tending to prove that defendant made: (1) an express warranty as to a fact or promise relating to the goods, (2) which was relied upon by the plaintiff in making his decision to purchase, (3) and that this express warranty was breached by the defendant. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E. 2d 588 (1982).

G.S. 25-2-313(2) provides:

It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

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The question we must answer is whether the statements as to value rose to the level of a warranty or whether they were merely opinion. The distinction between an affirmation or a description from mere sales talk or opinion or puffing is hazy. *Pake, supra*. 5 Williston on Sales § 17-5 (4th ed. 1974). The law recognizes that some sellers' statements are only sales palaver and not express warranties. Thus expressions such as "supposed to last a lifetime" or "in perfect condition" do not create an express warranty. *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972). Our review of the case law of this state revealed no case where an opinion as to value, standing alone, was sufficient to amount to an express warranty. This does not necessarily mean that value could never become expressly warranted, but it suggests that in the ordinary course of business, a statement as to value is not considered an express warranty. No special circumstances appear in this case which would separate defendant's statements as to value from those of other merchants in an ordinary transaction. We find defendant made no express warranty as to the value of the bracelet.

[2] Plaintiff next seeks relief claiming that defendant's oral representations as to the value of the bracelet constituted fraud. To make out a case of actionable fraud, plaintiff must show: (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made, or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiff; (e) that plaintiff reasonably relied upon the representations and acted upon it; and (f) that plaintiff suffered injury. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

Plaintiff has failed to present evidence tending to prove that defendant misrepresented an existing fact. The fact allegedly misrepresented was the value of the bracelet. Plaintiff put forth evidence at the summary judgment hearing suggesting the bracelet had a multitude of values: the list price, the price bargained for, the \$2,000 value suggested by the plaintiff and affirmed by action of the defendant, the three different appraisal values and the amount paid to consignor after the sale of the bracelet. The bracelet had no absolute value. All statements of value, oral or

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written, by the defendant or others, were not facts but opinions. Plaintiff knew statements of value were opinions because he entered into negotiations with defendant for a better price based upon the premise that the marked price was not an absolute value. A representation which is nothing more than an opinion as to the value of property, absent something more, does not constitute actionable fraud. *Laundry Machinery Co. v. Skinner*, 225 N.C. 285, 34 S.E. 2d 190 (1945). See also *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

[3] Finally, plaintiff asserts that defendant's specific oral representations and the written appraisal of value of the bracelet made by an experienced jeweler to the less knowledgeable buyer, who relied on defendant's expertise and knowledge, constitute unfair and deceptive acts because they were the sole inducement to the plaintiff to purchase the bracelet.

To determine if an act is unfair or deceptive under G.S. 75-1.1, the court must look at the facts surrounding the transaction and the impact on the marketplace. *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582 (1984).

Viewing the facts in context as presented by the plaintiff we find no unfair or deceptive trade practices. Plaintiff entered into a bargain which was freely negotiated over several days. Once the bargain had been struck, by agreement of the parties, defendant did not submit the signed charge slip to American Express for an additional several days. Plaintiff presented no evidence of overreaching, coercion or duress. He presented no evidence that the bracelet or its quality had been misrepresented. Plaintiff had ample opportunity to look after his own interests before the sale became final. See *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E. 2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983).

We find for the reasons recited above, entry of summary judgment was proper.

Affirmed.

Judges ARNOLD and WELLS concur.

Jackson v. Bumgardner

VARONICA L. JACKSON AND RUFUS H. JACKSON v. HEATH D. BUMGARDNER

No. 8411SC6

(Filed 6 November 1984)

1. Infants § 3— distinctions—wrongful pregnancy—wrongful life—wrongful birth

An action for wrongful pregnancy is brought by the parents of a healthy but unplanned child, an action for wrongful birth is brought by the parents of an impaired child, and an action for wrongful life is brought by or on behalf of the impaired child.

2. Physicians, Surgeons and Allied Professions § 12.1— wrongful pregnancy—12(b)(6) dismissal improper

The trial court should not have dismissed the plaintiffs' wrongful pregnancy claim for failure to state a cause of action. Wrongful pregnancy is a cause of action recognized in North Carolina in *Pierce v. Piver*, 45 N.C. App. 111, it is not dependent on whether the method of birth control is permanent or temporary, and it does not present problems incapable of resolution in the course of traditional tort litigation.

3. Physicians, Surgeons and Allied Professions § 11.2— action for wrongful pregnancy—not based on guaranteed result

Plaintiffs' action for wrongful pregnancy was not a suit upon a guaranteed result prohibited by G.S. 90-21.13(d) because plaintiffs alleged that defendant totally failed to perform his promise rather than that he guaranteed his performance to yield a specific result.

4. Physicians, Surgeons and Allied Professions § 21— wrongful pregnancy—father's right to seek damages

A father shares a mother's right to seek damages for negligent wrongful conception or pregnancy because (1) he is directly affected emotionally and financially by the birth of the unplanned child and (2) he shares the legal obligation to provide for the child's care and support, should damages for the latter be awarded.

5. Physicians, Surgeons and Allied Professions § 21— wrongful pregnancy—damages

Although the question of damages for wrongful pregnancy was not presented or reached, three views were noted: (1) damages relating to pregnancy and childbirth, (2) the costs of unsuccessful medical procedures, economic loss from pregnancy, and economic, physical and emotional costs attendant to birthing and rearing the child, (3) all damages flowing from the wrongful act, offset by the benefits of having a healthy child.

Chief Judge VAUGHN dissenting.

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APPEAL by plaintiffs from *Bailey, Judge*. Order entered 17 November 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 15 October 1984.

Plaintiffs brought an action for medical malpractice and wrongful conception or wrongful pregnancy, arising from defendant's alleged negligent failure to maintain in place or reinsert an intrauterine device. The court granted defendant's motion pursuant to G.S. 1A-1, Rule 12(b)(6) to dismiss the complaint. Plaintiffs appeal.

Nance, Collier, Herndon & Wheless, by James R. Nance, Jr., for plaintiff appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and Jodee Sparkman King, for defendant appellee.

WHICHARD, Judge.

In pertinent part, the complaint alleges the following:

Plaintiff-wife consulted defendant, a licensed physician, concerning uterine bleeding. Defendant performed on plaintiff-wife a dilation and curettage (D and C) of the uterus and a biopsy of the cervix. At the time of consultation and surgery plaintiff-wife was protected by a contraceptive intrauterine device (IUD) which defendant agreed to maintain in place or, if necessary, reinsert.

Three months later plaintiff-wife again consulted defendant concerning an ovarian cyst, and defendant performed exploratory surgery. At that time defendant reassured plaintiff-wife that she would continue to be protected by the intrauterine device. When plaintiff-wife became pregnant some months later, plaintiffs learned that the intrauterine device had not been maintained in place or reinserted. Plaintiff-wife gave birth to a healthy child.

Plaintiffs allege contract and negligence claims against defendant. They seek to recover medical expenses of plaintiff-wife and the child and the cost of rearing the child to maturity.

The trial court dismissed the complaint for failure to state a claim upon which relief can be granted. We reverse.

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I.

[1] An action for wrongful conception or wrongful pregnancy is generally brought by parents of a healthy, but unplanned, child against a physician or other health care provider for negligently performing a sterilization procedure or an abortion, or against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription. See *Phillips v. United States*, 508 F. Supp. 544, 545 n. 1 (D.S.C. 1981); see generally Holt, *Wrongful Pregnancy*, 33 S.C.L. Rev. 759 (1983). This action is to be distinguished from one for wrongful birth, which is generally brought by parents of an impaired child who claim that but for the negligence of the physician or other health care provider they would not have conceived or would have terminated the pregnancy. *Id.* See generally Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. Rev. 713 (1982). A third action, for wrongful life, is generally brought by or on behalf of the impaired child. See *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 478-83, 656 P. 2d 483, 494-97 (1983). While judicial adherence to this terminology has not been uniform, see Annot. 83 A.L.R. 3d 15 (1978), we write on a clean slate and are free to use the more precise language.

[2] Although the terms themselves have not been used, this Court has recognized a wrongful conception or wrongful pregnancy claim alleging medical malpractice and "sounding in negligence and breach of contract." *Pierce v. Piver*, 45 N.C. App. 111, 113, 262 S.E. 2d 320, 321-22 (1980). In *Pierce* the trial court granted a motion to dismiss plaintiffs' claims for damages for the birth of a healthy child after an allegedly negligently performed tubal ligation. This Court reversed, stating: "Plaintiffs' complaint adequately state[s] a claim for relief cognizable under existing legal principles of this jurisdiction. Similar complaints, alleging negligence and breach of contract, have been found sufficient in other jurisdictions." (Citations omitted.) *Id.*, 262 S.E. 2d at 322.

Defendant contends that *Pierce* is not applicable when, as here, the alleged malpractice concerns the failure to insert a temporary birth control device. We disagree and hold that *Pierce* controls.

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II.

No rational basis exists for distinguishing between temporary and permanent methods of birth control for the purpose of determining whether a complaint states a claim for wrongful conception or wrongful pregnancy. "The United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965), has recognized that a woman has the right to plan the size of her family." *Fulton-DeKalb Hosp. Authority v. Graves*, 252 Ga. 441, 442, 314 S.E. 2d 653, 654 (1984). This right is not dependent upon the choice of the means of birth control. Thus, pharmacists and pharmaceutical manufacturers are held liable for negligently filling prescriptions for temporary contraceptives when births result. See *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971) (action for wrongful conception where pharmacist negligently supplied tranquilizers instead of birth control pills).

We perceive no compelling reason to limit a patient's right to non-negligent health care to situations in which the patient chooses sterilization over the surgical insertion of an intrauterine device. Defendant acknowledges that negligent insertion or removal of an intrauterine device would be actionable if "injuries result." Injury does result, in a legal sense, from the birth of an unplanned child.

This action is simply a species of malpractice which allows recovery from a tortfeasor in the presence of an injury caused by intentional or negligent conduct. *Fulton-DeKalb Hosp. Authority v. Graves*, 252 Ga. at 443, 314 S.E. 2d at 654. An avoidable pregnancy resulting from negligent medical care is a recognizable injury. "[A] ruling that no recognizable cause of action could exist under such circumstances would leave the medical profession virtually immune from liability for improper treatment of patients justifiabl[y] seeking to avoid pregnancy." *Coleman v. Garrison*, 327 A. 2d 757, 761 (Del. Super. 1974).

III.

Defendant contends that a claim for relief for failure to insert an intrauterine device would open the door to fraudulent claims and that the injury is remote from the negligence. We note only

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that courts and juries have the ability to distinguish between meritorious and nonmeritorious claims, and that it is difficult to see how a negligent omission to insert an intrauterine device could be considered remote from a resulting pregnancy. Defendant's arguments, dealt with only briefly here, present problems capable of solution in the course of traditional tort litigation. See Note, "Wrongful Birth: A Child of Tort Comes of Age," 50 U. Cin. L. Rev. 65, 73-74 (1981); see also *University of Ariz. v. Superior Court*, 136 Ariz. 579, 582-83, 667 P. 2d 1294, 1297-98 (1983). For that reason and the reasons noted, we reject them.

IV.

[3] G.S. 90-21.13(d), raised by defendant as a defense, is inapplicable. It provides that

[n]o action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless . . . in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

This is not a suit upon a guaranteed result. Plaintiffs do not allege that defendant guaranteed his performance to yield a specific result; rather, they allege that he totally failed to perform as he promised.

V.

[4] Defendant's claim that plaintiff-husband has no standing to bring a wrongful pregnancy action is without merit. This Court implicitly recognized the husband's standing in such an action in *Pierce*, 45 N.C. App. 111, 262 S.E. 2d 320. As in actions for wrongful birth, a father shares a mother's right to seek damages for negligent wrongful conception or pregnancy because (1) he is directly affected emotionally and financially by the birth of the unplanned child and (2) he shares the legal obligation to provide for the child's care and support, should damages for the latter be awarded. See *DiNatale v. Lieberman*, 409 So. 2d 512 (Fla. Dist. Ct. App. 1982) (holding that the father's right is not dependent on the mother's cause of action but is his individually).

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VI.

[5] We are not presented with and do not reach the more difficult question of the measure of damages. As guidance to the trial court, however, we note authorities indicating that the law will recognize at least some types of damage which result from unplanned conception or pregnancy caused by the negligence of another. *See Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R. 3d 15, 29 (1978). Three views predominate. *See generally, University of Ariz. v. Superior Court*, 136 Ariz. at 582-86, 667 P. 2d at 1297-1301 (1983). The first line of authority limits damages to those which relate to the pregnancy and childbirth. *See Boone v. Mullendore*, 416 So. 2d 718, 721 (Ala. 1982); *see also Pierce*, 45 N.C. App. at 113, 262 S.E. 2d at 322 (Wells, J., concurring). The second, a minority view characterized as the "full damage" rule, allows the cost of unsuccessful medical procedures, economic loss from pregnancy, and economic, physical and emotional cost attendant to birthing and rearing the child. *See Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). The third allows recovery of all damages which flow from the wrongful act, offset by the benefits of having a healthy child. *Troppi v. Scarf*, 31 Mich. App. at 254-57, 187 N.W. 2d at 517-19.

It was improper to dismiss the action on defendant's Rule 12(b)(6) motion. The order is accordingly reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

Judge JOHNSON concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

In my view the trial judge properly allowed defendant's motion to dismiss.

Dobbins v. Paul

JULIA JEAN DOBBINS, PLAINTIFF-APPELLANT v. SAM PAUL AND WIFE,
DOROTHY PAUL, DEFENDANTS-APPELLEES

No. 8322DC1172

(Filed 6 November 1984)

1. Appeal and Error § 19— appeal as pauper—absence of affidavit of indigency and certificate of counsel—presumption

Although the record on appeal does not contain an affidavit of indigency or a certificate of counsel, it will be presumed that the trial court acted upon valid filings in its order allowing a civil pauper appeal. App. Rule 9(b)(1).

2. Landlord and Tenant § 13— refund of security deposit—wrongful eviction—erroneous dismissal of husband as party

The trial court erred in dismissing the husband as a party defendant in an action seeking the refund of a security deposit on a leased house and damages for wrongful eviction and breach of the warranty of quiet enjoyment where the house was owned by the husband and wife as tenants by the entireties, the husband had the exclusive right to rental income when the lease was signed in 1981, and the husband actively took part in removing plaintiff from the house and was responsible for any repayments to her.

3. Landlord and Tenant § 13— refund of security deposit

The trial court erred in directing a verdict for defendant lessors on plaintiff's claim for the refund of a security deposit under the Tenant Security Deposit Act, G.S. 42-50 to -56.

4. Landlord and Tenant § 13— damages for constructive eviction

Plaintiff lessee's evidence showing a wrongful demand and notice to vacate the leased premises by the lessors followed by her immediate surrender of possession of the premises was sufficient to show a constructive eviction which supported her claim for damages under G.S. 42-25.9.

5. Landlord and Tenant § 6.2— breach of covenant of quiet enjoyment

Plaintiff's lease carried with it an implied covenant that she would have the quiet and peaceable possession of the leased premises during the term of the lease, and her right to quiet enjoyment or possession was breached when she was constructively evicted by defendant lessors.

Judge ARNOLD concurs in result.

APPEAL by plaintiff from *Martin, Lester P., Jr., Judge*. Judgment entered 19 May 1983 in IREDELL County District Court. Heard in the Court of Appeals 18 September 1984.

Plaintiff Julia Dobbins sought rental housing for herself and her family. She answered a newspaper advertisement placed by defendants Paul, who were remodelling one of their rental homes

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and looking for a tenant for when they finished the work. In late September 1981, plaintiff visited the house and decided to rent it. Dealing with Mrs. Paul, plaintiff paid defendants a deposit of \$150.00 on 1 October 1981, although advised that the house would not be ready for occupancy until about the 15th. On 23 October 1981, a Friday, plaintiff and Mrs. Paul signed a one-year lease agreement, which identified Mrs. Paul as the "Lessor" and plaintiff as the "Lessee," and plaintiff received a key to the house. The agreement provided for a deposit of \$150.00 and monthly rental of \$350.00. It made provision for repairs, notice, separate payment of utilities, and eviction for non-payment of rent. At the time the lease was signed, plaintiff paid defendants \$67.64 for rent from Monday, 26 October, to the end of the month. Plaintiff arranged to move her furniture into the house over the weekend, 24 and 25 October, although Mrs. Paul indicated that she and her husband planned to finish up remodelling work during the weekend. The house would not be fully ready until Monday, 26 October.

Plaintiff and her family spent the weekend moving furniture into the house and arranging it. After plaintiff returned to her daughter's home to spend Sunday night, she received a call from Mrs. Paul. Mrs. Paul demanded that plaintiff remove her furniture from the house "first thing Monday morning." Plaintiff was angry and upset, but agreed to move out. The next morning, Monday, 26 October, Mr. Paul called plaintiff several times to repeat the demand. He stated that his wife was waiting at the house for plaintiff to come and remove her furniture. After trying unsuccessfully to obtain a truck, plaintiff and her family arrived at the house and took the furniture out. A light rain was falling, so they placed as much of the furniture as possible on the porch. Plaintiff demanded her money back, but Mrs. Paul refused, saying that that was up to her husband. Mr. Paul arrived, inspected and locked the house, and paid back the \$67.64 in advance rent. He refused to refund the deposit. Plaintiff could not find a truck to rent with the money she had, nor could any of the community service agencies help her immediately. She could not remove her belongings until three days later, and consequently, numerous items were stolen or damaged by rain. Defendants eventually returned \$75.00 of the \$150.00 deposit, without any accounting for the remainder.

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Plaintiff thereupon commenced this action, seeking an accounting and refund of the deposit, compensatory damages for wrongful eviction and breach of the warranty of quiet enjoyment, punitive damages, treble damages for unfair trade practices, and reasonable attorney fees. The case was tried before a jury. At the close of plaintiff's evidence, defendants moved for and obtained directed verdicts on all claims. Plaintiff appealed.

Legal Aid Society of Northwest North Carolina, Inc., by Gwyneth B. Davis, for plaintiff.

No brief for defendants.

WELLS, Judge.

[1] This is a civil pauper appeal. Plaintiff gave notice of appeal 27 May 1983, and the trial court did not enter its order allowing the appeal until 12 July 1983. We are aware that in the past such orders had to issue within ten days after notice of appeal, failing which the appellate division lacked jurisdiction to consider the appeal. N.C. Gen. Stat. § 1-288 (1968); *Powell v. Moore*, 204 N.C. 654, 169 S.E. 281 (1933). However, the General Assembly deleted the statutory provision in 1971, requiring only that the affidavit of indigency and certificate of counsel be submitted within the ten-day period. 1971 N.C. Sess. Laws, c. 268, s. 12; G.S. § 1-288. The record on appeal does not contain the affidavit and certificate; nor need it. Rule 9(b)(1) of the Rules of Appellate Procedure. Where the record is silent on a particular point, we will presume that the trial court acted correctly and regularly. *State v. Dew*, 240 N.C. 595, 83 S.E. 2d 482 (1954). Accordingly, we presume that the trial court relied upon valid filings and therefore hold that the appeal is properly before us.

The principal question presented by this appeal is the correctness of the directed verdicts for defendants. A directed verdict should not be allowed unless it appears as a matter of law that plaintiff cannot recover upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Perma-stone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982). Internal conflicts in the evidence are resolved in the plaintiff's favor. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978). If, taking plain-

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tiff's evidence as true, reasonable minds could differ as to its import, the matter should go to the jury. *Id.*

[2] Applying this standard, the trial court clearly erred in granting defendants' motion for directed verdict dismissing Sam Paul as a party defendant. Defendants admitted that the house was owned by the entireties. At the time the lease was signed in 1981, Mr. Paul accordingly enjoyed an exclusive right to rental income from the property. *Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643 (1965).¹ He therefore was a real party in interest. N.C. Gen. Stat. § 1A-1, Rule 17 of the Rules of Civil Procedure (1983); *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206, *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977) (Rule 17 applies to defendants). Moreover, there was plenary evidence that Mr. Paul actively took part in removing plaintiff from the house and was in fact responsible for any repayments to her. Plaintiff more than satisfied her burden on this issue.

[3] Likewise, the trial court clearly erred in granting defendants' motion for a directed verdict on the claim under the Tenant Security Deposit Act, N.C. Gen. Stat. § 42-50 to -56 (Supp. 1983). The trial court apparently accepted defendants' contention that the deposit was not a security deposit, but was simply to "hold the house." However, defendants unequivocally admitted in their answer that they did "accept a security deposit." This constituted a judicial admission conclusively establishing the fact. *Downey v. Downey*, 29 N.C. App. 375, 224 S.E. 2d 255, *disc. rev. denied*, 290 N.C. 550, 226 S.E. 2d 509 (1976); 2 Brandis, Brandis on N.C. Evidence § 177 (2d rev. ed. 1982). Defendants' conduct in retaining \$75.00, allegedly to pay for exterminator work, would itself suffice to defeat directed verdict on this ground. See G.S. § 42-51 (purposes of deposit). The trial court's suggestion that the Deposit Act did not apply due to failure of notice within 30 days after the beginning of the lease term relates to the *landlord's* obligation to notify the tenant of the location of trust accounts or bond, G.S. § 42-50, and is entirely irrelevant to this case.

[4] We turn now to the central issue, whether the trial court correctly granted directed verdicts on the wrongful eviction and

1. N.C. Gen. Stat. § 39-13.6 (Supp. 1983), which gave husband and wife equal right to rental income from entireties property, did not become effective until 1 January 1983. 1981 N.C. Sess. Laws (Reg. Sess. 1982) c. 1245, s. 2.

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breach of covenant claims. When a wrongful demand or notice to quit or vacate leased premises is made by a lessor, or landlord, and is followed by immediate surrender of possession by the lessee, or tenant, a constructive eviction has been accomplished. 52 C.J.S. *Landlord And Tenant* § 458 (1968). Under our Ejectment Of Residential Tenants Act (the Act), N.C. Gen. Stat. §§ 42-25.6,² -25.9 (1983 Cum. Supp.), defendants' exclusive remedy to regain possession of their house was by means of statutory summary ejectment proceedings pursuant to N.C. Gen. Stat. §§ 42-26 to -36.1 (1976). Plaintiff's evidence having shown that she was wrongfully evicted on Monday, 26 October after her lease was in effect, plaintiff's statutory remedy for damages under G.S. § 42-25.9(a)³ attached. It is clear that the trial court erred in granting defendants' motion for a directed verdict on plaintiff's claim for relief under the Act.

In that the statute expressly disallows treble or punitive damages in such cases, it is clear that the trial court correctly allowed defendants' motion for a directed verdict as to plaintiff's claims for relief in which she alleged and sought such damages.

[5] It was also error for the trial court to dismiss plaintiff's claim for breach of her right of quiet enjoyment. In the absence of a provision to the contrary, plaintiff's lease carried with it an implied covenant that she would have the quiet and peaceable possession of the leased premises during the term of the lease. *See generally Produce Co. v. Currin*, 243 N.C. 131, 90 S.E. 2d 228 (1955); *see also Marshall v. Miller*, 47 N.C. App. 530, 268 S.E. 2d 97 (1980), *modified and affirmed*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Plaintiff having been constructively evicted, it is clear her

2. § 42-25.6. *Manner of ejectment of residential tenants.* It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 of this Chapter.

3. § 42-25.9. *Remedies.* (a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

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right to quiet enjoyment or possession was breached. We are careful to point out, however, that even so, under explicit language of the Act, plaintiff can recover only her actual damages.

As to the trial court's order dismissing Sam Paul as a party defendant,

Reversed.

As to the trial court's granting defendants' motion for directed verdict on plaintiff's claim for relief under the Tenant Security Deposit Act,

New trial.

As to plaintiff's claims for relief for wrongful statutory eviction and for breach of her covenant of peaceful possession,

New trial.

In all other respects, the judgment of the trial court is

Affirmed.

Judge HILL concurs.

Judge ARNOLD concurs in result.

NORTH CAROLINA NATIONAL BANK v. WILLIAM CARTER AND WIFE,
SARAH A. CARTER

No. 8320SC1215

(Filed 6 November 1984)

- 1. Unfair Competition § 1; Rules of Civil Procedure § 54— denial of treble damages and attorney's fees—theory not raised in pleadings or during trial—proper**

The trial court did not err by denying defendants' motion for treble damages and attorney's fees, made after the return of a favorable verdict on

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their counterclaim for fraudulent misrepresentation, because neither the pleadings nor the evidence suggested that defendants were proceeding on an unfair or deceptive trade practice claim, defendants tried their case without reference to or reliance upon G.S. 75-1.1 *et seq.*, and plaintiff defended its case solely on common law fraud. Moreover, the specific finding of willfulness or unwarranted refusal to settle required for award of attorney's fees was not present. G.S. 1A-1, Rule 54(c).

2. Fraud § 12— real property—fraudulent misrepresentation—evidence sufficient

On a counterclaim for fraudulent misrepresentation in the sale of real property, the evidence was sufficient to withstand motions for a directed verdict, judgment n.o.v., and a new trial where it tended to show that the defendants learned of the property from one of plaintiff's officers; that the officer showed one of defendants the property twice; that the boundaries were pointed out and the defendant was told that the property contained a modular home, a well, and a septic tank; that the defendant could see that the boundaries contained the house, well, and septic tank without walking the land; and that plaintiff's officer was in a superior position to know the material facts and made representations either with knowledge of their falsity or in culpable ignorance of their truth with the expectation that they would be relied and acted upon.

3. Limitation of Actions § 8.2— fraud—sufficient notice of facts—jury question

The question of whether defendants' claim of fraudulent misrepresentation was barred by the statute of limitations was properly submitted to the jury, and the jury decision was not reversed on appeal, where the record showed that defendants had a long and satisfactory business relationship with plaintiff; that defendants had sufficient confidence in plaintiff to believe representations by its officers; that this purchase was not sufficiently different from previous transactions to put defendants on notice that further inquiry was needed; that there were no occurrences subsequent to the purchase to cause defendants to suspect fraud; and that defendants did not become aware of the facts until the property was surveyed, within the limitation period. G.S. 1-52.

APPEAL by plaintiff and defendants from *Helms, Judge*. Judgment entered 13 July 1984 in Superior Court, UNION County. Heard in the Court of Appeals 19 September 1984.

Plaintiff, North Carolina National Bank (hereinafter NCNB) brought this action seeking to recover a deficiency resulting from the foreclosure and sale of property secured by a deed of trust given by defendants William and Sarah A. Carter, to NCNB in 1980. Defendants answered and counterclaimed for damages as a result of fraudulent misrepresentation.

At trial, defendants stipulated to the entry of judgment against them on NCNB's claim for a deficiency. Defendants' claim

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for fraudulent misrepresentation was tried before a jury. The evidence adduced at trial tended to show that at the time of the transaction of which they complain, defendants were engaged in the business of real estate development and rentals. NCNB was familiar with defendants' business and it handled most of defendants' banking needs. William Carter learned about the house and lot for sale from Ray Petty, manager of the consumer loan department at NCNB. William Carter was shown the property on two separate occasions by Petty. Although the boundary lines were pointed out to Mr. Carter, he and Petty did not walk the boundaries. The modular home, well and septic tank were represented to him by Petty to be on the property.

After seeing the property, Mr. Carter offered \$10,000 for it. This offer was accepted and following the purchase, defendants rented the property to a third party.

Thereafter, defendants entered an oral contract to sell the property but NCNB refused to finance the sale. M & J Finance Corporation agreed to finance the sale but required that a survey be done. The survey, completed 12 February 1981, showed that the well, septic tank, and most of the house were not on the property purchased by the defendants.

At the close of the defendants' evidence and again at the close of all the evidence, NCNB moved for and was denied a directed verdict. The following issues were submitted to and answered by the jury:

1. Did the plaintiff fraudulently represent to the defendant that a house, well and septic tank were located on the lot purchased by the defendant from the plaintiff?

Answer: Yes.

2. What amount of damages, if any, is the defendant entitled to recover from the plaintiff?

Answer: \$6,000.00.

3. Was the counterclaim of the defendant commenced within 3 years from the date the defendant discovered the facts constituting fraud or within 3 years from the time a

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reasonable person would be put on notice of the facts constituting fraud?

Answer: Yes.

Following the jury verdict, and before entry of judgment, both parties made post-verdict motions. From the denial of their motion to treble the damages for attorney's fees, defendants appealed. NCNB appealed from the denial of their motions for a directed verdict, judgment notwithstanding the verdict, or a new trial.

Dawkins, Glass & Lee, P.A., by W. David Lee for plaintiff appellant and appellee.

Ronald Williams, P.A., by Ronald Williams for defendant appellants and appellees.

WEBB, Judge.

[1] In their sole assignment of error, defendants contend that the trial court erred in denying their post-verdict motion for treble damages and attorney's fees pursuant to G.S. 75-16 and G.S. 75-16.1. They contend that Rule 54(c) of the Rules of Civil Procedure permits the court to grant them such relief as they are entitled even though it was not previously demanded.

Rule 54(c) in pertinent part provides:

[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

When read in a manner consistent with the other Rules of Civil Procedure, with their focus on notice, claims, and counter-claims, Rule 54(c) enjoys an important, though limited role. Indeed, it is well-settled that adherence to the particular legal theories that are suggested by the pleadings is subordinate to the court's duty to grant the relief to which the prevailing party is entitled. *Nugent v. Beckham*, 37 N.C. App. 557, 561, 246 S.E. 2d 541, 545 (1978). *Ports Authority v. Roofing Co.*, 32 N.C. App. 400, 408, 232 S.E. 2d 846, 852 (1977). It is equally well-settled, however, that the relief granted must be consistent with the claims pleaded and embraced within the issues determined at trial, which pre-

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sumably the opposing party had the opportunity to challenge. *Allison v. Allison*, 51 N.C. App. 622, 625, 277 S.E. 2d 551, 554 (1981); *Harris v. Ashley*, 38 N.C. App. 494, 498, 248 S.E. 2d 393, 396 (1978). Simply put, the scope of a lawsuit is measured by the allegations of the pleadings and the evidence before the court and not by what is demanded. Hence, relief under Rule 54(c) is always proper when it does not operate to the substantial prejudice of the opposing party. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F. 2d 712, 716-17 (4th Cir. 1983). Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial.

In the present case, neither the pleadings nor the evidence adduced at trial suggested that the defendants were proceeding on an unfair and deceptive trade practice claim. Defendants tried their case without reference to or reliance upon G.S. 75-1.1 *et seq.* Similarly, NCNB defended its case solely as a defense to common law fraud, and it did not litigate or assert any defenses to an unfair and deceptive trade practice claim. To permit defendants to change legal theories after the trial and verdict would not only deprive NCNB of a jury determination on that claim, but would subject NCNB to liability on a claim which it had no opportunity to evaluate or defend. Unquestionably, proof of fraud necessarily constitutes a violation of G.S. 75-1.1, and under ordinary circumstances defendants would be entitled automatically to treble the damages fixed by the jury. G.S. 75-16; *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E. 2d 397, 402 (1981); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975). However, fundamental fairness and due process required that NCNB be "illuminate[d] as to the substantive theory under which [defendants were] proceeding and to the possibility of the extraordinary relief sought prior to defendant's post-verdict motion for treble damages." *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, *supra* at 717.

Similarly, defendants' request for attorney's fees was also properly denied. Under G.S. 75-16.1, attorney's fees may only be awarded upon a specific finding by the trial judge "that the party charged with the violation . . . willfully engaged in the act or practice, and there was an unwarranted refusal by such party to pay the claim which constitutes the basis of such suit." *Marshall v. Miller*, *supra*, at 549, 276 S.E. 2d at 404. Here, there was no

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finding by the trial judge that NCNB willfully violated G.S. 75-1.1 or that NCNB's refusal to settle defendants' claim was unwarranted, proof of which were conditions precedent to the recovery of attorney's fees under G.S. 75-16.1. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, *supra*, at 716, n. 4. Accordingly, we conclude defendants' post-verdict motion was properly denied and that Rule 54(c) did not permit an award of treble damages and attorney's fees to defendants.

[2] We next consider NCNB's claims on its cross-appeal. NCNB first contends that the trial court erred in denying its motions for a directed verdict at the close of all the evidence, for a judgment notwithstanding the verdict and alternatively, for a new trial. Each of these motions presents the question of whether the evidence was sufficient to go to the jury. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979); *Morrison v. Kiwanis Club*, 52 N.C. App. 454, 279 S.E. 2d 96, *cert. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981). The evidence, viewed in the light most favorable to defendants, tended to show that defendant Carter learned of the property from Petty. He was shown the property by Petty on two separate occasions. The boundaries were pointed out to him, and he was told specifically that the property contained a modular home, a well, and a septic tank. He did not walk the land to inspect the boundaries, but from the point which the property was shown, Carter could see that the home, well, and septic tank were within the alleged boundaries. Generally, the buyer is under no duty to have an accurate survey of the boundaries done, and he has the right to rely on the boundary representations made by the seller when the seller purports to know them. *Kleinfelter v. Developers, Inc.*, 44 N.C. App. 561, 564, 261 S.E. 2d 498, 500 (1980). Here, the NCNB officer was in a superior position to know the material facts and he made the representations either with the knowledge of their falsity or in culpable ignorance of their truth, expecting Carter to rely and act thereon, which he did. One to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon. *Kleinfelter v. Developers, Inc.*, *supra*, at 565, 261 S.E. 2d at 500; *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E. 2d 444, 447 (1955). Whether Carter's reliance on NCNB's representations was reasonable was a question properly

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submitted to the jury. *Vickery v. Construction Co.*, 47 N.C. App. 98, 102, 266 S.E. 2d 711, 714, *pet. for disc. review denied*, 301 N.C. 106, --- S.E. 2d --- (1980). We conclude that there was sufficient evidence of NCNB's fraudulent misrepresentation to withstand the motions for a directed verdict and a judgment notwithstanding the verdict. Therefore, the trial court did not err in denying NCNB's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial.

[3] We find no merit in NCNB's final contention that defendants' claim is barred by the statute of limitations. G.S. 1-52 provides that the statute of limitations for a cause of action based on fraud is three years. The cause of action accrues upon discovery of the fraud or from the time it should have been discovered. G.S. 1-52(9). *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 304, 271 S.E. 2d 385, 391 (1980), *rehearing denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981). Whether a plaintiff should have discovered the facts constituting fraud more than three years prior to the institution of the action ordinarily is a question for the jury. *Johnson v. Insurance Co.*, 44 N.C. App. 210, 222, 261 S.E. 2d 135, 144 (1979), *rev'd on other grounds*, 300 N.C. 247, 266 S.E. 2d 610 (1980); *Little v. Rose*, 285 N.C. 724, 727, 208 S.E. 2d 666, 668 (1974). The record reveals that defendant Carter had a long and satisfactory business relationship with NCNB, and that he had sufficient confidence in NCNB to believe the representations made by its bank officers. There is no evidence that this purchase was sufficiently different from their previous transactions so as to place defendant Carter on notice that further inquiry was required. Indeed, there were no occurrences or events subsequent to the purchase that would have reasonably caused defendant Carter to suspect the existence of fraud. All the evidence tended to show that Carter did not become aware of the true facts until 12 February 1981 when the property was surveyed. Therefore, the question of whether defendant Carter in the exercise of due diligence, should have discovered the fraud during the limitations period was properly submitted to the jury, and the jury determined the issue adversely to NCNB's position. As the jury's determination was not clearly wrong, it will not be reversed on appeal.

For reasons stated, the judgment of the trial court is

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Affirmed.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. JAMES WILLIE BETHEA

No. 8326SC1153

(Filed 6 November 1984)

1. Criminal Law § 163— necessity for objection to charge

No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds for his objection. App. Rule 10(b)(2).

2. Assault and Battery § 11.3— assault on law officer—allegation of performance of duties

An indictment for the felony offense of assault with a firearm on a law enforcement officer performing a duty of his office in violation of G.S. 14-34.2 need not allege the particular duty the officer was performing at the time of the assault but must allege only that the officer was performing a duty of his office at such time.

3. Criminal Law § 138— assault on law officer—aggravating factor—purpose of preventing lawful arrest

In imposing a sentence upon defendant for assault with a firearm on a law officer performing a duty of his office, the evidence supported the trial court's finding as a factor in aggravation that the offense was committed for the purpose of preventing a lawful arrest.

4. Criminal Law § 138— aggravating factor—use of weapon normally hazardous to multiple lives

In imposing a sentence upon defendant for assault with a firearm on a law officer performing a duty of his office, evidence that defendant used a .30-.30 lever action rifle did not support a finding as an aggravating factor that defendant employed a weapon normally hazardous to the lives of more than one person. G.S. 15A-1340.4(a)(1)(g).

5. Criminal Law § 138— mental condition of defendant—failure to find as mitigating factor

The trial court did not err in refusing to find as a mitigating factor that defendant's mental condition significantly reduced his culpability for the offense.

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APPEAL by defendant from *McConnell, Judge*. Judgment entered 21 March 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1984.

This is a criminal case in which the defendant was indicted, tried and convicted of felonious assault with a firearm on a law enforcement officer performing a duty of his office. From a verdict of guilty, the defendant appeals, based on the trial court's charge to the jury, the alleged insufficiency of the indictment and the erroneous imposition of a sentence in excess of the presumptive term.

Just prior to 9:00 a.m. on 20 August 1982, defendant was observed sitting on a bench in the courtyard of the Mecklenburg County Courthouse. Defendant had in his possession a .30-30 lever action rifle. His presence drew the attention of several persons including a Mecklenburg County Sheriff's Deputy who reported defendant to his supervisor. The supervisor ordered the deputy to investigate defendant. The deputy approached defendant.

In the course of the events that followed, defendant allegedly shot at the deputy with his rifle and the deputy returned fire with his service revolver, wounding defendant. Both defendant and the deputy testified at the trial but their testimony was in conflict as to the nature and sequence of events. The deputy testified that he was attempting to arrest defendant. Defendant testified that there was no arrest attempt, that the deputy fired first and that defendant's rifle fired accidentally after defendant had been wounded by the deputy.

Attorney General Edmisten, by Assistant Attorney General Richard L. Kucharski, for the State.

Appellate Defender Stein, by James R. Glover, Director, Appellate Defender Clinic, University of North Carolina School of Law, for the defendant.

EAGLES, Judge.

I

Defendant first argues on appeal that the trial court's charge to the jury misstated the law, contained expressions of opinion

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and was so disorganized and confusing that the defendant should be granted a new trial. We disagree.

We note at the outset that the learned trial judge did not follow the North Carolina Pattern Jury Instructions, substituting his own instructions instead. While the instructions to the jury, taken as a whole, correctly conveyed the essence of the case to the jury, the preferred method is the approved guidelines of the North Carolina Pattern Jury Instructions.

[1] No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds for his objection. Rule 10(b)(2), Rules of Appellate Procedure. The record indicates that the only objection made was a "broadside challenge" to the charge as a whole at its conclusion. Having failed to make a proper objection to the charge, this issue is not properly before us. However, we have independently examined the record and find that the jury charge, taken as a whole, is correct and presents the law fairly and clearly to the jury. Technical errors and slight misstatements will not mandate a new trial. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983).

Our examination of the record reveals that the trial court misspoke the distinction between assault with a firearm on a law enforcement officer performing a duty of his office and the lesser offense of assault with a deadly weapon. The trial court made the complained of mistake on two occasions. However, the trial court correctly set out the elements on six other occasions in the charge.

Defendant argues that the trial court, in setting forth the State's evidence, failed to preface the narrations a sufficient number of times with cautionary words informing the jury that the court was merely recapitulating the evidence offered by the State as opposed to setting forth an opinion as to what the evidence shows. Our reading of the record discloses that there were more than adequate cautionary instructions to the jury. For these reasons, we find no error.

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II

[2] Defendant next argues that the allegations in the indictment were not sufficiently specific to permit entry of judgment for the felony offense of assault with a firearm on a law enforcement officer performing a duty of his office. We disagree.

The indictment upon which this conviction is based charged that the defendant did:

Unlawfully, willfully and feloniously assault James C. Cameron, a law enforcement officer of the Mecklenburg County Sheriff's Department, with a rifle, which is a firearm, by shooting at him with the rifle. At the time of the assault, that officer was performing a duty of his office.

Defendant contends that the indictment must specify the particular duty the officer was performing at the time of the assault. We hold that it is not necessary to allege the particular duty, only that the law enforcement officer was performing a duty of his office at the time the assault occurred.

While we have not previously addressed this narrow issue in regard to G.S. 14-34.2, the charge for which defendant was indicted and convicted, it has been addressed with regard to G.S. 14-33(b)(4) which makes it a misdemeanor offense to assault a law enforcement officer while he is discharging or attempting to discharge a duty of his office. In *State v. Waller*, 37 N.C. App. 133, 245 S.E. 2d 808 (1978) we held that:

[A]n assault upon an officer while he is discharging or attempting to discharge a duty of his office is an offense punishable under G.S. 14-33(b)(4), regardless of its effects or intended effects upon the officer's performance of his duties. The particular duty the officer was performing when assaulted is not of primary importance, it only being essential that the officer was performing or attempting to perform *any* duty of his office. [Citations omitted.]

We find no compelling reason to insist that an indictment charging the felony offense of assault with a firearm on a law enforcement officer performing a duty of his office should require more, as to the particular duty being performed, than that required to charge a violation in a warrant of G.S. 14-33(b)(4). The

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indictment was sufficient in that it charged, at the time of the assault, that the officer was performing a duty of his office.

III

Defendant next argues that the trial court erred by imposing a sentence in excess of the presumptive term based on improperly found aggravating factors and the absence of mitigating factors which were proven by the evidence. We agree that the trial court erred in finding as an aggravating factor that the defendant employed a weapon normally hazardous to the lives of more than one person.

[3] As to the aggravating factor that the offense was for the purpose of preventing a lawful arrest, we find no error. While the offense charged does not require that the officer actually be in the process of arresting the defendant in order to be "performing a duty of his office," there was evidence tendered at trial from which the trial judge could find as an aggravating factor that the offense was committed for the purpose of preventing a lawful arrest. The lawfulness of the arrest was not at issue in the guilt determination phase of the trial and was not challenged by the defendant at the sentencing phase.

The law enforcement officer testified at trial that he was going to arrest the defendant for the common law offense of going armed to the terror of the public. In order for the *arrest* to be lawful, the officer must believe the defendant has committed a criminal offense in his presence. G.S. 15A-401(b)(1). This requirement was clearly met here.

[4] As to the aggravating factor that the defendant employed a weapon *normally* hazardous to the lives of more than one person, we find error. The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns or bombs would fit that description. These weapons are *normally* hazardous to the lives of more than one person. A rifle, while it may *sometimes* be dangerous to the lives of more than one person, is not so *normally*.

While we do not minimize the danger that a loaded rifle presents to the public, especially in a setting such as a metropolitan

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area courthouse square, we do not feel that a .30-.30 lever action rifle was a weapon contemplated by the legislature in G.S. 15A-1340.4(a)(1)(g).

We also note that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. G.S. 15A-1340.4(a)(1). Here, in order to prove the offense charged, it was necessary for the State to tender proof that the defendant used the .30-.30 lever action rifle in the assault. Thus, it was improper to base a finding of an aggravating factor as evidence necessary to prove an element of the offense. See, *State v. Massey*, 62 N.C. App. 66, 302 S.E. 2d 262, *modified and aff'd*, 309 N.C. 625, 308 S.E. 2d 332 (1983).

[5] As to the failure of the trial court to find any mitigating factors, we find no error.

The trial court considered a psychiatric report from Dr. Bob Rollins of Dorothea Dix Hospital. Dr. Rollins' report clearly indicates that defendant, though suffering from a mixed personality disorder and functioning in the dull-normal range of intellectual ability, nevertheless had an understanding of his legal situation and was capable of proceeding to trial.

While we acknowledge that capability of proceeding to trial and culpability for the crime charged are two separate issues, the trial court, acting as finder of fact, considered the evidence and refused to find that defendant's mental condition significantly reduced his culpability for the offense. Based on the record before us, we cannot say that the trial court erred in this respect.

For finding as an aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, we must remand for resentencing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). In the trial of this case, there is no error.

Remanded for resentencing.

Judges ARNOLD and WHICHARD concur.

Dayal v. Provident Life and Accident Ins. Co.

MANJIT K. DAYAL AND GURBACHAN S. DAYAL v. PROVIDENT LIFE AND
ACCIDENT INSURANCE COMPANY

No. 8314SC1244

(Filed 6 November 1984)

**1. Insurance § 57; Master and Servant § 55.6— injury suffered while sleeping—
not “in the course of employment”**

In an action to recover under a wife's health insurance policy which excluded bodily injuries “arising from or in the course of any employment,” injuries which occurred when a ceiling fan fell on plaintiff husband, a covered dependent, while he was sleeping in a back area of his convenience store were not “in the course of his employment.” Plaintiff had completely abandoned his employment for a substantial period, and the fact that he owned the sleeping area was merely fortuitous.

**2. Insurance § 57; Master and Servant § 55.4— injury suffered while sleeping—
did not “arise from” employment**

Injuries which occurred when a ceiling fan fell on a plaintiff who was taking a forty-five minute nap in the back of his convenience store did not “arise from” his employment and were not excluded from coverage under a health insurance policy. The conditions and circumstances of plaintiff's employment would not naturally or probably expose him to the risk of being injured while he was taking a nap.

APPEAL by plaintiffs from *Barnette, Judge*. Judgment entered 8 August 1983 in DURHAM County Superior Court. Heard in the Court of Appeals 20 September 1984.

The parties do not dispute the basic facts of the case. Plaintiff husband owned and operated a convenience store. Plaintiff's wife, who worked for Burlington Industries, obtained group health insurance with defendant Provident, effective at all relevant times, through her employer. Plaintiff husband was a covered dependent under the policy. During summer hours at the store, plaintiff husband would take afternoon naps in a back area while his son, out of school, tended to the business. While plaintiff husband was thus napping one afternoon, he was struck in the head by a falling ceiling fan. He suffered severe injuries resulting in over \$18,000 in medical expenses. Defendant denied coverage and plaintiffs filed suit. Following trial before the court, sitting without a jury, the court entered judgment for defendant. Plaintiffs appealed.

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Walker, Lambe & Crabtree, by Guy W. Crabtree, for plaintiffs.

Newsom, Graham, Hedrick, Bryson, Kennon & Faison, by James L. Newsom and Joel M. Craig, for defendant.

WELLS, Judge.

The policy of insurance on which plaintiff sued contained an exclusion "for treatment of bodily injuries arising from or in the course of any employment." The trial court in rendering judgment for defendant, concluded that the accident which caused plaintiff Manjit Dayal's injuries did not "arise from" Dayal's employment, but did occur "in the course" of such employment. We disagree, and therefore reverse.

The identical exclusionary language relied on by defendant has come before this court once before, where we ruled that the phrase "arising from or in the course of" employment was unambiguous. *Brown v. Insurance Co.*, 35 N.C. App. 256, 241 S.E. 2d 87 (1978). This exclusionary language essentially follows that of the Workers' Compensation Act ("the Act"), which covers injury by accident "arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (Supp. 1983). A cursory examination of the vast array of cases which have applied this language makes clear that it is anything but unambiguous when sought to be applied to differing factual situations. See cases collected at 19A N.C. Digest *Workmen's Compensation* §§ 608-667 (1965 and Supp. 1984). Our holding in *Brown* must be read in this context. We turn now to the decisions under the Act for guidance in this case.

In applying the principles of workers' compensation law, it must be remembered that case law reflects a long-settled policy that the provisions of the Act are to be construed liberally and in favor of the employee. See *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); 99 C.J.S. *Workmen's Compensation* § 20 (1958). This case involves application of exclusionary provisions of an insurance policy, on the other hand, and a different public policy governs: since the insurer prepares the contract of insurance, doubts as to its effect are resolved against the insurer and in favor of coverage. See *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978); 13 J. Appleman & J. Appleman, *Insurance Law and Practice* § 7401 (1976).

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[1] The trial court ruled that plaintiff husband's injury occurred "in the course of" his employment. The term, as used in workers' compensation cases, refers to the time, place, and circumstances of the accident. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982). Activities which an employee undertakes in pursuit of his personal comfort constitute part of the circumstances of the course of employment. *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 310 S.E. 2d 38 (1983). The "personal comfort doctrine," relied on by the trial court, provides a test for determining when such activities fall within the course of the employment:

An employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment. . . .

"Such acts as are necessary to the life, comfort and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment. Such acts are regarded as inevitable incidents of the employment, and accidents happening in the performance of such acts are regarded as arising out of and in the course of the employment."

Id. (quoting *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97 (1946)). (Citations omitted.)

Various personal comfort activities have been held by North Carolina courts to fall within the course of employment under the doctrine. See *Rewis v. Insurance Co.*, *supra* (visit to washroom); *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869 (1945) (smoke break); *Spratt v. Duke Power Co.*, *supra* (visit to canteen). The activity involved here, sleeping, appears however to be squarely before our courts for the first time.¹

1. Sleeping on the job was involved in *Stallcup v. Wood Turning Co.*, 217 N.C. 302, 7 S.E. 2d 550 (1940). However, as Justice Seawell's dissent in *Stallcup* made clear, the evidence was equivocal and the sleeping apparently was only one of several factors in the decision.

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The courts of other states have split on whether injuries incurred while sleeping on the job arise in the course of employment. Generally, such injuries do *not* arise in the course of employment if (1) sleeping is contrary to positive duties of the employee, *Union Indem. Co. v. Malley*, 1 S.W. 2d 923 (Tex. Civ. App. 1927), *rev'd on other grounds*, 12 S.W. 2d 1002 (Tex. 1929) (watchman); or (2) where the sleep is unintentional, *Culberson v. Daniel Hamm Drayage Co.*, 286 S.W. 2d 813 (Mo. 1956); or (3) where there is an enforced lull in work. *Spencer v. Chesapeake Paperboard Co.*, 186 Md. 522, 47 A. 2d 385 (1946).

Where the sleep is intentional, however, it appears that the extent of the departure from work and the nature of the work itself are determinative. Thus, if the employee rests briefly, especially if the physical nature of the job suggests it, sleep during intentional rest may be in the course of employment. *Richards v. Indianapolis Abattoir Co.*, 92 Conn. 274, 102 A. 604 (1917) (driver slept briefly near boiler on cold day). This is consistent with the North Carolina rule that *temporary* absences from work usually are within the course of the employment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). On the other hand, where the employee deliberately abandons his work for a substantial time and goes off to sleep, intentional sleep may be outside the course of the employment. *Colucci v. Edison Portland Cement Co.*, 94 N.J. Law 542, 111 A. 4 (1920) (asleep three hours while work backlog developing). Again, North Carolina follows a similar rule with respect to the degree to which an employee departs from his duties. See *Jackson v. Dairymen's Creamery*, 202 N.C. 196, 162 S.E. 359 (1932) ("total" departure from assigned duty not in course of employment).

With the foregoing principles in mind, we hold that the trial court erred in concluding that the accident occurred "in the course of" plaintiff's employment. Plaintiff had left the work area and had gone off to another area, totally unused in his business, to sleep for forty-five minutes. The fact that plaintiff also owned the sleeping area appears merely fortuitous and does not affect the result. This is especially true in light of the uncontradicted evidence that plaintiff's son never disturbed him during his naps. Plaintiff having completely abandoned his employment for a sub-

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stantial period, the accident that befell him accordingly did not occur in the course of his employment.²

[2] Defendant cross-assigns error to the trial court's ruling that the accident did not "arise from" the employment. In the context of this case, we conclude that "arising from" in the policy means the same as "arising out of." The trial court used this interpretation. As used in the Act, "arising out of" refers to the origin or causal connection of the accidental injury to the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). The controlling test of whether an injury "arises out of" the employment is whether the injury is a natural and probable consequence of the nature of the employment. *Id.* The conditions or obligations of the employment must have put the employee at the place where the accident occurred. *Pittman v. Twin City Laundry*, 61 N.C. App. 468, 300 S.E. 2d 899 (1983). Such was not the case here. The conditions and circumstances of Manjit Dayal's employment, the nature of his employment, were not such as to naturally or probably expose him to the risk of being injured while he was taking a forty-five minute nap. Defendant's argument must be rejected, and defendant's cross-assignment of error is overruled.

On the undisputed facts of this case, plaintiffs are entitled to judgment in their favor on the issue of liability, and it is so ordered. The case must be remanded for appropriate findings and judgment as to damages.

Reversed and remanded.

Judges ARNOLD and HILL concur.

2. The trial court ruled that the sleep period "benefitted" the employment. The court misapplied a rule which deals with injuries occurring during unauthorized work activities, not under the personal comfort doctrine. See *Hoyle v. Isenhour Brick and Tile Co.*, *supra*.

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STATE OF NORTH CAROLINA v. JERRY WILLIAMS

No. 838SC1307

(Filed 6 November 1984)

1. Searches and Seizures § 3— search of abandoned jacket

The trial court properly found that defendant abandoned any expectation of privacy in his jacket when he dropped it in a public place while fleeing from officers, and marijuana found during a search of the jacket was admissible in evidence without any finding as to probable cause for the search.

2. Constitutional Law § 28— officer's accidental firing of revolver—no constitutional violation

An officer's accidental discharge of his revolver while chasing the fleeing defendant did not constitute a flagrant violation of defendant's Fourth Amendment rights requiring a dismissal of a charge against defendant for possession of marijuana with intent to sell and deliver.

3. Constitutional Law § 67— identity of informant

In a prosecution for possession of marijuana with intent to sell and deliver, the trial court did not err in denying defendant's motion for the disclosure of the name of a confidential informant where defendant made no showing that the identity of the informant was essential, relevant or even helpful to his defense.

4. Constitutional Law § 30— police report—denial of in-camera inspection

The trial court did not err in denying defendant's motion for an *in-camera* inspection of a police report discovered during examination of a law officer, since internal reports of law officers are not subject to disclosure. G.S. 15A-904.

5. Narcotics § 4— intent to sell and deliver marijuana—sufficiency of evidence

Although evidence that 27.6 grams of marijuana were found in defendant's jacket was insufficient to raise a presumption that the marijuana was possessed for sale and delivery, evidence that the marijuana was packaged in seventeen separate, small brown envelopes known in street terminology as "nickel or dime bags" was sufficient to permit the jury to find that the marijuana was possessed for the purpose of sale and delivery. G.S. 90-95(d).

6. Criminal Law § 46— mere fact of flight—refusal to give requested instructions

The trial court did not err in refusing to give defendant's requested instruction as to the mere fact of fleeing from a detective.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 26 August 1983 in Superior Court, WAYNE County. Heard in the Court of Appeals 19 September 1984.

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This is a criminal case in which defendant was convicted at a jury trial of felonious possession of marijuana with intent to sell and deliver in violation of G.S. 90-95.

On 26 April 1983, two detectives of the Wayne County Sheriff's Department were approached by a confidential informant who advised the detectives that defendant was in possession of marijuana.

The two detectives operating an unmarked pickup truck, drove into the parking area of a carwash at which defendant and another male were sitting in defendant's automobile. Before the pickup truck was fully stopped, the defendant got out of his automobile and ran. One of the detectives identified himself as a sheriff's deputy and shouted a command for defendant to halt. Defendant allegedly dropped a jacket he had been wearing and continued to run. A shot was fired from the service revolver of the pursuing detective. The State's evidence tended to show the discharge of the service revolver was accidental. The discarded jacket was discovered to contain 17 individual brown envelopes containing marijuana which had a total weight of 27.6 grams. Defendant was later arrested, indicted, tried, convicted and sentenced to four years in the custody of the Department of Corrections. The other individual who had been sitting in defendant's car jumped a nearby fence and fled. He was not apprehended.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers for the State.

John E. Duke, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's denial of his motion to suppress the marijuana seized from his jacket. We find no error.

Defendant asserts that the trial court failed to find that there was probable cause to search defendant's vehicle or that defendant had drugs in his possession or was committing a crime. We note, however, that the trial court concluded, based on the evidence, that defendant voluntarily discarded and abandoned his

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jacket along with any expectation of privacy with respect to the jacket. The jacket was dropped in a public place and defendant continued to flee the area. Therefore, it was not necessary for the trial court to find that there was probable cause to search defendant's vehicle, that defendant had drugs in his possession, or that defendant was committing a crime. Further, in light of the evidence presented by the State, it was not error for the trial court to conclude as a matter of law that defendant had abandoned any expectation of privacy in his jacket. *State v. Teltser*, 61 N.C. App. 290, 300 S.E. 2d 554 (1983).

II

[2] Defendant next argues that the trial court erred in denying his motion to dismiss based upon "a flagrant violation of defendant's constitutional rights." We disagree.

Defendant cites no authority for this proposition but argues that since the detective "jumped out of his vehicle with his weapon in his hand, and discharged the weapon by pulling the trigger" that defendant's rights under the Fourth Amendment were violated. Defendant characterizes these actions as "gestapo like."

The State's evidence tends to show that the detectives went to the carwash based on reliable information, that the defendant had marijuana in his possession, that the defendant began to flee when approached by the detectives, that the detective gave chase after identifying himself as a law enforcement officer and ordering defendant to halt, and that the detective then stumbled while in pursuit, causing his service revolver to accidentally discharge. We have examined the record carefully and find no violation of any rights conferred upon defendant by the Fourth Amendment to the Constitution of the United States. While the detective may have been clumsy in the handling of his weapon, there was no evidence to indicate that the detective intentionally fired his weapon at the fleeing defendant.

III

[3] Defendant next argues that the trial court erred in denying his motion for the disclosure of the name of the alleged confidential informant. We disagree.

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Again, defendant cites no authority in support of his argument. However, we note that unless the disclosure of an informer's identity is relevant and helpful to the defense of the accused or is essential to a fair determination of the case, the defendant is not ordinarily entitled to disclosure of an informer's identity. *State v. Cherry*, 55 N.C. App. 603, 286 S.E. 2d 368, *rev. denied*, 305 N.C. 589, 292 S.E. 2d 572 (1982). Here, defendant has made no showing that the identity of the informant would be essential, relevant, or even helpful to defendant. Defendant shows no prejudice by the trial court's refusal to order disclosure of the identity of the informant.

IV

[4] Defendant next argues that the trial court erred in denying his motion for an *in-camera* inspection of a police report discovered during examination of a law enforcement witness. We disagree.

While examining a law enforcement witness, defendant discovered that the witness had prepared a report of the incident in question for the sheriff. Defendant alleges that this violated the continuing duty to disclose pursuant to G.S. 15A-907. However, G.S. 15A-904 provides that internal reports of law enforcement officers are not subject to disclosure. See also, *State v. Gillespie*, 33 N.C. App. 684, 236 S.E. 2d 190 (1977).

V

[5] Defendant next argues that the trial court committed error in refusing to dismiss the first count of the indictment. We disagree.

Count one of the indictment charges that defendant unlawfully and willfully possessed marijuana with the intent to sell and deliver. The basis of defendant's argument is that the amount of marijuana, 27.6 grams (there are 28.35 grams in one ounce), recovered from defendant's jacket is insufficient to raise a presumption that the marijuana was possessed for sale and delivery, a felony. Defendant cites G.S. 90-95(d) in support of his argument which provides a maximum punishment of a fine not to exceed more than \$100.00 for the possession of less than one ounce of marijuana. Defendant's argument would be persuasive except for the

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evidence of how the 27.6 grams of marijuana was packaged. The evidence at trial showed that the marijuana in question was packaged in seventeen separate, small brown envelopes known in street terminology as "nickel or dime bags." "Nickel or dime bags" are the units in which small amounts of marijuana are generally sold for five or ten dollars. The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); see also *State v. Casey*, 59 N.C. App. 99, 296 S.E. 2d 473 (1982). While it is true that there was no direct evidence that defendant possessed the 27.6 grams of marijuana for sale and delivery, the circumstances of the packaging could be considered by the jury in finding defendant guilty of the felony offense. See, *State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *cert. denied*, 298 N.C. 302, 259 S.E. 2d 916 (1979).

VI

[6] Defendant next argues that the trial court erred in refusing to submit a requested instruction as to the mere fact of fleeing from the detective.

Defendant cites no authority for the proposition advanced herein and fails to show how he was prejudiced by the refusal of the trial court to instruct the jury as defendant requested. We find nothing in the record that would lead us to conclude that defendant was entitled to the requested instruction. Any error that might have been committed in refusing defendant's proffered instruction is harmless. The result here might be different if the trial court had instructed the jury that an accused's flight from the scene of a crime is competent evidence on a question of guilt. *State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977). However, such an instruction was not requested by the State nor was it given by the trial court.

For the reasons herein mentioned, we find no error in the trial of this case. Defendant's further assignments of error are without merit.

No error.

Judges WEBB and BRASWELL concur.

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STATE OF NORTH CAROLINA v. ANTHONY RAY HARRIS

No. 832SC1188

(Filed 6 November 1984)

1. Searches and Seizures § 43— denial of motion to suppress—affidavit not timely

Where defendant filed a pretrial motion to suppress without the affidavit required by G.S. 15A-977(a), then moved to amend the motion and file the affidavit during trial, defendant's motion to suppress was not in proper form, the motion to amend was not timely, and the court's denial of the motions was within its discretion. G.S. 15A-972.

2. Searches and Seizures § 45— motion to suppress—no voir dire—proper

The trial court properly denied defendant's motion to suppress without a *voir dire* hearing where defendant did not contend and the record did not show that he did not have a reasonable opportunity to make the motion before trial, or that the State did not give sufficient notice of its intention to use such evidence, or that additional facts had been discovered since a pretrial denial of the motion which could not have been discovered before determination of the motion. G.S. 15A-975(a), (b), (c).

3. Robbery § 4.3— attempted armed robbery—evidence sufficient

In a prosecution for attempted armed robbery, the evidence was sufficient to go to the jury and supports the verdict of guilty where the victim testified that defendant approached and stopped him; ordered him to empty his pockets; pulled a pistol partly out of a pocket so that the victim saw the hammer and handle of the gun; again told the victim to empty his pockets; and left after the victim, because of the gun, emptied his pockets of all that he had on him, three pennies.

4. Criminal Law § 138— aggravating factors—prior convictions—no objection to evidence

The trial court did not err in considering prior convictions in aggravation where defendant made no challenge to the admissibility of evidence of the prior convictions. G.S. 15A-1340.4(a)(1)(l).

APPEAL by defendant from *Smith, Judge*. Judgment entered 3 May 1983 in the Superior Court, BEAUFORT County. Heard in the Court of Appeals 17 September 1984.

Defendant was tried upon indictment proper in form charging him with attempted armed robbery. From a jury verdict of guilty and the imposition of an active sentence, defendant appeals.

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Attorney General Rufus L. Edmisten, by William F. Briley, Assistant Attorney General, for the State.

McLendon and Partrick, by Christopher B. McLendon, for defendant.

JOHNSON, Judge.

The State's evidence tended to show that on 16 December 1982, defendant approached Willie Cox and while partially exhibiting a pistol to Willie Cox, ordered him to empty his pockets. Cox, upon seeing the partially concealed pistol, complied with defendant's demand and emptied his pockets, disclosing three pennies he had with him. Upon seeing that Cox had only three pennies, defendant stated, "That ain't crap" and left.

Defendant testified in his own behalf and denied any involvement or even seeing Cox on the date in question. Defendant also presented evidence of two alibi witnesses.

Defendant contends the trial court erred in dismissing defendant's motion to suppress and in failing to conduct a *voir dire* hearing on the question of identification.

On 2 March 1983, defendant filed a pretrial motion to suppress any identification testimony on the grounds that the pretrial identification procedures violated defendant's constitutional right to counsel and due process of law. The motion was not accompanied by an affidavit. No action was taken regarding the motion prior to trial. During trial, defendant lodged a general objection to the in-court identification testimony of the victim. Defendant also moved to have a *voir dire* hearing and moved to file a motion entitled "Amendment to Motion to Suppress-Affidavit." The court denied defendant's motion to amend, denied his motion for a *voir dire* hearing, and summarily denied and dismissed defendant's pretrial motion to suppress.

[1] The exclusive method of challenging evidence on grounds that its exclusion is constitutionally required is a motion to suppress made in compliance with the procedural requirements of Article 53 of Chapter 15A of the General Statutes. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E. 2d 859, *cert. denied and appeal dismissed*, 306 N.C. 561, 294 S.E. 2d 374 (1982). G.S. 15A-977(a)

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provides in pertinent part that a pretrial motion to suppress evidence in Superior Court *must* (1) be in writing, (2) state the grounds upon which it is made and (3) be accompanied by an affidavit containing facts supporting the motion.

We note at the outset that the court's ruling on the defendant's motion to amend was within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. 1 Strong's N.C. Index, Appeal and Error, § 54.1, pp. 332-33. The statute requires that the affidavit be filed with the motion to suppress *before* trial. Defendant's motion to amend was not timely. We find no abuse of discretion in the court's ruling.

Defendant argues that the trial court erred by summarily denying and dismissing his pretrial motion to suppress. We disagree. The trial court summarily denied and dismissed defendant's pretrial motion to suppress on the ground that it was not accompanied by an affidavit. Our Courts have held that a motion to suppress pursuant to G.S. 15A-972 and 15A-977, which is not accompanied by an affidavit containing facts supporting it, is not proper in form and may therefore be summarily dismissed. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); *State v. Simmons*, 59 N.C. App. 287, 296 S.E. 2d 805 (1982), *cert. denied*, 307 N.C. 701, 301 S.E. 2d 395 (1983). This assignment is without merit.

[2] Defendant also argues that notwithstanding the dismissal of his pretrial motion to suppress, the trial court erred in not conducting a *voir dire* hearing in light of his objection and in light of his oral motion at trial for a *voir dire* hearing. We find this argument to be without merit.

G.S. 15A-975(a)(b) and (c) provide in pertinent part that a defendant may move to suppress evidence at trial *only* if defendant demonstrates (a) that he did not have a reasonable opportunity to make the motion before trial; or (b) that the State did not give defendant sufficient notice of the State's intention to use such evidence; or (c) that after a pretrial determination and denial of the motion, additional facts have been discovered which could not have been discovered with reasonable diligence before determination of the motion. Our Courts have held that when none of the exceptions to making the pretrial motion to suppress applies, failure to make the pretrial motion pursuant to statute constitutes a waiver by defendant of his objections to the admission

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of the evidence. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); *State v. Drakeford*, 37 N.C. App. 340, 246 S.E. 2d 55 (1978). Defendant does not contend nor does the record reveal that any of the exceptions are applicable here. We conclude that the trial court did not abuse its discretion in the denial of defendant's motion to amend and that the court was correct in denying and dismissing defendant's motions to suppress without conducting a *voir dire* hearing.

[3] Defendant contends the court erred in failing to dismiss the attempted armed robbery charge for reasons of insufficiency of the evidence and in its denial of defendant's motion to set aside the verdict as contrary to the weight of the evidence. Defendant argues that under the State's evidence there is no showing that defendant committed an overt act designed to bring about a robbery, thereby endangering or threatening Cox's life.

Willie Cox testified that on 16 December 1982, the defendant approached and stopped him and ordered him to empty his pockets. Defendant then pulled a pistol partially out of his pocket and again told him to empty his pockets. Cox testified further that although defendant did not remove the pistol entirely from his pocket, he removed it "so I could see it"; that he in fact saw the handle and hammer of the gun and that he emptied his pockets as defendant ordered because of the gun defendant had. Upon seeing that Cox had only three pennies on him, defendant stated, "That ain't crap" and left. Defendant's exhibition of the pistol so that Cox could see it while at the same time demanding that Cox empty his pockets clearly constitute overt acts calculated and designed to bring about a robbery, and clearly conveyed the message that Cox's life was being threatened. The evidence was sufficient to go to the jury and supports the verdict. Accordingly, the court's denial of defendant's motion to dismiss was correct. See *State v. Green*, 2 N.C. App. 170, 162 S.E. 2d 641 (1968). Compare *State v. Jacobs*, 31 N.C. App. 582, 230 S.E. 2d 550 (1976). The court also properly denied defendant's motion to set aside the verdict. Where there is sufficient evidence to support the verdict, the trial court acts within its discretion in denying defendant's motion to set aside the verdict. *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975).

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[4] Next, defendant contends the court erred in considering in aggravation G.S. 15A-1340.4(a)(1)(o) (that defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement). We disagree.

For purpose of sentencing, the court considered and found as a factor in aggravation defendant's prior convictions consisting of resisting arrest, damage to personal property, and three convictions of misdemeanor larceny. The court found that the factors in aggravation outweighed the factors in mitigation and imposed a sentence greater than the presumptive. In *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), the Court held that the initial burden of challenging the admissibility of evidence of defendant's prior convictions rests upon the defendant; that defendant may challenge the evidence prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State. In the case at bar, defendant made no challenge of the admissibility of evidence of his prior convictions for consideration as an aggravating factor in sentencing. This assignment of error is without merit.

By his final assignment of error, defendant assigns error to alleged improprieties in the prosecutor's jury argument. We have carefully reviewed this assignment and the record and find it to be without merit.

In the trial of defendant's case we find

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

In re Foreclosure of Ruepp

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF FERDINAND RUEPP AND BILLIE LEE RUEPP, GRANTORS, TO LARRY W. BYRD, TRUSTEE, AS RECORDED IN BOOK 4230 AT PAGE 48 OF THE MECKLENBURG PUBLIC REGISTRY. SEE APPOINTMENT OF SUBSTITUTE TRUSTEE AS RECORDED IN BOOK 4663 AT PAGE 895 OF THE MECKLENBURG PUBLIC REGISTRY

No. 8326SC1187

(Filed 6 November 1984)

Mortgages and Deeds of Trust § 15— foreclosure of subordinate deed of trust—no default under “due on sale” clause

The foreclosure of a subordinate deed of trust and the resulting conveyance by the trustee to a party other than the original borrower does not amount to a sale of the property by the borrower so as to constitute an event of default under a “due on sale” clause in the senior deed of trust which would allow the original lender to accelerate payment of the outstanding balance owed to it where the senior deed of trust expressly permitted subordinate deeds of trust.

APPEAL by Petitioner, Columbus Mutual Life Insurance Company, from *Saunders, Judge*. Judgment entered 15 August 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 August 1984.

This is a special proceeding in which petitioner Columbus Mutual Life Insurance Company (petitioner) seeks to foreclose on a deed of trust pursuant to a due on sale clause contained in the instrument.

The essential facts are:

On 31 August 1979, Ferdinand Ruepp and wife, Billie Lee Ruepp (borrowers) executed a deed of trust to Larry W. Byrd, trustee for Stockton, White and Company (lender), securing a promissory note in the original principal amount of \$52,500. This deed of trust (original deed of trust) was subsequently assigned by lender to petitioner which at all times relevant to this action has been the owner and holder of the instruments.

The original deed of trust in this case is a standard Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (FNMA/FHLMC) uniform instrument containing in paragraph 17 what is commonly referred to as the “FNMA/FHLMC due on sale clause” which reads as follows:

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17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, *excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust; (b) the creation of a purchase money security interest for household appliances; (c) a transfer by devise, descent, or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase*, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

If Lender exercises the option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which the Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof. [Emphasis added.]

On 21 February 1981, borrowers executed a subordinate lien in the form of a deed of trust in favor of James W. Kiser, trustee for North Carolina National Bank (N.C.N.B.), securing a promissory note in the original principal amount of \$15,570 (second deed of trust).

Upon default by borrowers, Lewis H. Parham, Jr., as substitute trustee, was instructed by N.C.N.B. to institute foreclosure proceedings on the second deed of trust and note. On 28 January

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1983, pursuant to an order of the Assistant Clerk of Superior Court of Mecklenburg County, Lewis H. Parham, Jr., as substitute trustee for N.C.N.B., executed and filed for record a deed conveying the property secured to Gary H. Watts Realty Company (respondent) which is the appellee here.

On 18 April 1983 respondent received written notice from petitioner that the foreclosure on the second deed of trust and conveyance of the secured property to respondent constituted an event of default under the original deed of trust. This notice also included petitioner's election to accelerate the debt secured by the original deed of trust and a demand that respondent pay the debt in full. Respondent refused to pay the debt in full and petitioner began foreclosure proceedings on the original deed of trust.

On 23 June 1983, the Honorable Jane S. Barkley, Assistant Clerk of Superior Court of Mecklenburg County, denied foreclosure of the original deed of trust holding that the conveyance of the property by the substitute trustee under the second deed of trust would not invoke the right of petitioner to declare a default under the original deed of trust.

From the order denying foreclosure of the original deed of trust, petitioner appealed, requesting a trial *de novo* before the Superior Court of Mecklenburg County. At the trial *de novo*, all matters were stipulated to by the parties with the exception of a conclusion that an event of default existed under the original deed of trust. The trial court upheld the Assistant Clerk of Superior Court's order and ordered the substitute trustee of the original deed of trust not to proceed with the foreclosure. Petitioner appeals.

Manning, Fulton and Skinner, by Charles L. Fulton, and E. Fred McPhail, for Columbus Mutual Life Insurance Company, petitioner-appellant.

Kenneth W. Parsons, for Gary H. Watts Realty Company, respondent-appellee.

EAGLES, Judge.

This appeal raises an issue of first impression: Whether the foreclosure of a subordinate deed of trust activates the due on

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sale clause of the standard FNMA/FHLMC Uniform Instrument. We hold that it does not.

I

Petitioner first assigns as error the trial court's conclusion of law that petitioner elected to use the FNMA/FHLMC standard instrument as the original deed of trust and that petitioner thereby impliedly waived the acceleration provisions of paragraph 17. We find no error.

Petitioner argues that there was no evidence before the trial court upon which it could conclude that petitioner elected to use the FNMA/FHLMC standard instrument as the original deed of trust. The only evidence presented at the trial *de novo* was contained in the stipulations which make no reference to the manner in which the language of the original deed of trust was agreed upon, nor to the manner in which the printed form used was selected. We note, however, that the trial court is always permitted to incorporate matters of such common knowledge that they are subject to "judicial notice." See, generally, 1 Stansbury, North Carolina Evidence, Section 11 (Brandis Ed. 1982). It is common knowledge that institutional lenders customarily dictate the form and language of the loan documentation to be used. Further, even if the conclusion was error, the error was harmless and petitioner has shown no prejudice.

II

Petitioner next assigns as error the trial court's refusal to conclude that an event of default existed under the original deed of trust, and that petitioner was entitled to accelerate the payment due. We find no error.

We agree that this assignment of error appears to present an issue of first impression in North Carolina: Whether the foreclosure of a subordinate deed of trust and the resulting conveyance to a party other than the original borrower amounts to a sale of "all or any part of the property or an interest therein . . . by Borrower without Lender's prior written Consent" so as to constitute default under the senior deed of trust containing the FNMA/FHLMC due on sale clause. We hold that such a foreclosure is not a default under the FNMA/FHLMC due on sale clause.

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Our appellate courts have upheld due on sale clauses containing acceleration provisions. *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976); *In Re Foreclosure of Bonder*, 306 N.C. 451, 293 S.E. 2d 798 (1982); and *In Re Foreclosure of Taylor*, 60 N.C. App. 134, 298 S.E. 2d 163 (1982). None of these cases address the narrow issue now before us.

An examination of the due on sale clause in question shows on its face that the type of subordinate lien foreclosed on in the instant case is expressly permitted. We think that where a subordinate lien is expressly permitted, the lender should reasonably anticipate that the borrower could default and the second lien could be foreclosed upon. Where a subordinate lien is expressly allowed, the trial court was correct in concluding as a matter of law that the lender impliedly waived the acceleration provisions of paragraph 17 upon the later exercise of the power of sale contained in the subordinate, second deed of trust. Petitioner, as assignee of the lender, is bound by the express terms of the instruments.

We note that the sale was not *by the borrower*. The sale and conveyance was ordered by the Assistant Clerk of Superior Court, Mecklenburg County and carried out by the substitute trustee.

We hold that the conveyance of the real property in question pursuant to the power of sale in the second deed of trust does not constitute an event of default under the terms of the FNMA/FHLMC due on sale clause contained in the original deed of trust sought to be foreclosed herein and does not entitle the petitioner to accelerate payment of the outstanding balance. The order of the Superior Court is affirmed. Petitioner's other assignments of error are without merit.

Affirmed.

Judges ARNOLD and WHICHARD concur.

In re Khork

IN THE MATTER OF: JAMES AARON KHORK

No. 8322DC1302

(Filed 6 November 1984)

1. Infants § 18— delinquency proceeding—qualification of expert witness

In an action in which defendant juvenile was adjudicated delinquent for setting fire to a school, a witness was properly qualified to testify as an expert that the fire had not been caused by electrical malfunction where the witness had been employed since 1960 as an electrical inspector for the North Carolina Department of Insurance, held an "unlimited electrical contractor's license," had attended seminars on electrically caused fires, and had aided the S.B.I. in determining the causes of approximately twenty-five other fires. It was irrelevant that the witness had received no formal degree in view of his extensive experience and practical training.

2. Infants § 18— delinquency proceeding—defendant's emotional reaction to questioning—admissible

Testimony by an S.B.I. agent that defendant would not meet the agent's eyes and had his heart in his throat when he was interviewed after the fire was admissible as a "shorthand description" of defendant's nervous reaction to being questioned. The trier of fact was not precluded from making an independent evaluation of the evidence presented.

3. Infants § 17— delinquency proceeding—defendant's extrajudicial confessions—corroborating circumstances

In a delinquency proceeding for burning a school, there was sufficient evidence of corroborative circumstances clearly pointing to defendant juvenile where defendant's extrajudicial confessions contained details unknown to all but the arsonist before the official investigation was completed.

4. Infants § 20— delinquency—commitment order—insufficient evidence

Defendant's commitment to the division of youth services was not justified by the record of the dispositional hearing where there was no evidence of the inappropriateness of probation and no evidence to support an order of commitment. G.S. 7A-649, 652.

APPEAL by defendant from *Fuller, Judge*. Judgment entered 18 July 1983 in District Court, ALEXANDER County. Heard in the Court of Appeals 26 September 1984.

Defendant juvenile, born 8 January 1970, was adjudicated delinquent under G.S. 7A-517(12) for the 8 May 1983 burning of a school in violation of G.S. 14-60. On 22 August 1983 the court conducted a dispositional hearing and ordered the commitment of defendant into the custody of the Division of Youth Services for an indefinite period not to exceed his 18th birthday.

In re Khork

On Sunday, 8 May 1983, the East Junior High School in Alexander County was extensively damaged by fire. Expert witnesses testified that the fire was not caused by electrical fault, nor by the burning of hydrocarbon fuels. The cause was "incendiary" in nature. The fire had been ignited by the application of a flame to loose materials, paper and trash, in or immediately around the desk of Larry Sharpe and later spread throughout the building.

On the night of the fire, defendant was a 13-year-old sixth grader and a member of Larry Sharpe's homeroom class. The evidence suggested that defendant was angry with his teacher and several witnesses testified that two days prior to the fire defendant spoke of wanting to "burn down" the school. Later, defendant bragged to at least five classmates that he had carried out his threat. Defendant was reputed to be a "joker," but days before the cause and specific place of origin of the fire were independently determined, he told a friend that he had set the fire with matches in the trash can beside Larry Sharpe's desk. There was no sign of forcible entry but it was shown that defendant knew of classroom windows which were unlocked and accessible.

In the adjudicatory hearing, defendant's motion for dismissal based upon the insufficiency of the evidence was denied. On 18 July 1983, the court held that defendant juvenile was, beyond a reasonable doubt, a delinquent juvenile as defined by G.S. 7A-517(12). At the subsequent dispositional hearing, evidence of defendant's home life, reputation, lack of prior offenses, and psychological profile was presented. The court appointed Juvenile Court Counselor and all concerned parties agreed that it would be in the best interests of defendant that he be placed on probation and reunited with his family. The court, however, asserted that "under the lessor dispositional alternatives suitable for this case, . . . the juvenile presents a threat to . . . the community" and ordered defendant committed to the Division of Youth Services for an indefinite period not to exceed his 18th birthday. Defendant appeals.

Attorney General Edmisten, by Jane Rankin Thompson, Assistant Attorney General, for the State.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for defendant appellant.

In re Khork

VAUGHN, Chief Judge.

[1] Defendant first contends that it was error for the court to permit David B. Maddrey to testify that, in his opinion as an expert, the fire was not caused by electrical malfunction. We disagree. Generally, "[a]n expert witness is a person who is better qualified than the jury to form an opinion from facts in evidence." *State v. Brackett*, 55 N.C. App. 410, 416, 285 S.E. 2d 852, 857, *rev'd on other grounds*, 306 N.C. 138, 291 S.E. 2d 660 (1982). Stated alternatively, "[t]he essential question determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." *State v. Phifer*, 290 N.C. 203, 213, 225 S.E. 2d 786, 793 (1976). In the present case there was sufficient evidence to qualify the witness as an expert in the "field of electrical causation of fires." Mr. Maddrey has been employed since 1960 as an electrical inspector for the North Carolina Department of Insurance. He holds an "unlimited electrical contractor's license," has attended seminars on the effects of electrically caused fires and has aided the S.B.I. in determining the cause or causes of approximately 25 other fires. It is irrelevant that Maddrey has received no formal degree in view of his extensive experience and practical training. He was clearly more qualified than the jury to form an opinion from the facts presented about the school's electrical system and was therefore properly accepted as an expert witness.

[2] Defendant next maintains that it was error for the court to admit testimony regarding S.B.I. agent David Campbell's impressions of defendant's emotional state as he was interviewed after the fire. Agent Campbell's testimony contained the following:

Q. What, if anything, did you observe about James Khork's reaction to that fire?

Mr. Gaines: Object.

COURT: Overruled.

A. He would not look me in the eyes.

Mr. Gaines: Move to strike that testimony.

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COURT: Overruled.

A. His heart, I could see his heart (inaudible) in his throat.

Defendant maintains that this testimony is subjective, conclusive and blatantly prejudicial. We cannot agree. "The emotion displayed by a person on a given occasion is a proper subject for opinion testimony by a non-expert witness." *State v. Looney*, 294 N.C. 1, 14, 240 S.E. 2d 612, 619 (1978) (witness properly allowed to testify that "the man's eyes 'lit up'" upon meeting another); 1 Stansbury, North Carolina Evidence § 129 (Brandis rev. 1973). Campbell's statements merely constituted a "shorthand description" of defendant's nervous reaction to being questioned and in no way precluded the trier of fact from making an independent evaluation of the evidence presented. *State v. Myers*, 299 N.C. 671, 674, 263 S.E. 2d 768, 771 (1980).

[3] Defendant next assigns as error the trial court's denial of his motion to dismiss on the grounds that the circumstantial evidence presented by the State was insufficient to sustain a guilty verdict. In support of his contention, defendant cites the proposition that an extrajudicial uncorroborated confession of a defendant, standing alone, is insufficient to submit the question of defendant's guilt to the jury. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *modified mem.*, 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed. 2d 1213 (1976). Although valid, defendant's authority is misapplied. In the present case, the State has offered sufficient evidence of extrinsic circumstances which suggest that defendant's "confessions" were no mere offhand jest and which, when viewed with his admissions, clearly point to defendant as the perpetrator of the crime. These extrajudicial confessions contained details that were unknown to all but the arsonist until the official police investigation was completed. Defendant revealed that he knew both the exact location of the fire's place of origin, beside his teacher's desk, and the "incendiary" means by which the fire was ignited. Evidence of the expression of these details clearly constitutes sufficient corroborative evidence which gives rise to a reasonable inference of defendant's guilt. In this jurisdiction, "[i]f the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the [trier of fact] to decide whether the facts shown satisfy [him] beyond a reasonable doubt of defend-

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ant's guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838 (1981). We must also remind defendant that the State's evidence need not exclude every reasonable hypothesis of innocence. *Id.* The verdict is not defective simply because it fails to disprove the culpability of all those with access to the building. Although circumstantial, the evidence was clearly sufficient to withstand a motion to dismiss and to provide a logical and reasonable inference of defendant's guilt.

[4] We are persuaded, however, by the contention that defendant's commitment to the Division of Youth Services is not justified by the record of the dispositional hearing. G.S. 7A-649 provides that in the case of any juvenile found to be delinquent, a judge may impose any of ten dispositional alternatives. Yet Article 52 also directs that the judge shall select the "least restrictive disposition . . . that is appropriate to the seriousness of the offense, the degree of culpability indicated . . . and the age and prior record of the juvenile. A juvenile should not be committed . . . if he can be helped through community-level resources." G.S. 7A-646. Commitment is appropriate only if the judge finds "that (1) alternatives to commitment available in G.S. 7A-649 have been unsuccessfully attempted or are inappropriate, and (2) the juvenile's behavior is a threat." *In re Vinson*, 298 N.C. 640, 672, 260 S.E. 2d 591, 610 (1979) (citing G.S. 7A-652) [emphasis original]. This statutory framework was designed to provide flexible treatment in the "best interests" of both the juvenile and the State and to accordingly restrict the option of institutionalization to those "extraordinary situation[s]" where "no reasonable alternative [is] open to the court. . . ." *In re Brownlee*, 301 N.C. 532, 551-52, 272 S.E. 2d 861, 873 (1981).

The statutory standard has therefore been held to *direct* that the trial judge recite detailed findings in support of either test enunciated under G.S. 7A-652, and *require* "that those enumerated findings are supported by *some evidence in the record of the dispositional hearing.*" *Vinson*, 298 N.C. at 672, 260 S.E. 2d at 610 [emphasis original]. In the present case, as in *Vinson*, there was no evidence of the inappropriateness of probation presented at the dispositional hearing. Indeed, no evidence to support an order of commitment was presented. We believe that the trial court clearly erred. Where no evidence of the appropriateness of incarceration is presented in the dispositional hearing, defendant

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may not be committed based upon the perceived seriousness of the offense alone. Such actions would otherwise render the dispositional hearing a useless formality and ignore the legislative directive that the commitment of delinquent juveniles is presumptively inappropriate. We, therefore, sustain defendant's final assignment of error and direct the trial court to apply an appropriate alternative based upon the evidence presented on remand.

Affirmed in part, vacated in part. Remanded for new dispositional hearing.

Judges WHICHARD and JOHNSON concur.

BILL R. CANADY v. JAMES HARDIN AND CHARLES ALLEN

No. 8425SC16

(Filed 6 November 1984)

Insurance § 2.2— insurance agents—failure to inform—insufficient evidence of unfair trade practice and negligence

Summary judgment was properly entered for defendant insurance agents in an action to recover damages for an unfair trade practice and negligence in failing to inform plaintiff, the owner of a business, that insurance on the life of his wife, who was a vice-president of the business, might be "questionable" because of a requirement that all persons eligible for coverage work at least twenty hours per week in the business where defendants presented materials establishing that they had no knowledge that plaintiff's wife worked less than twenty hours per week for plaintiff's business, and plaintiff failed to present evidence that defendants did have such knowledge. G.S. 75-1.1.

Judge PHILLIPS concurring in result.

APPEAL by plaintiff from *Ferrell, Judge*. Judgment entered 10 September 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 16 October 1984.

This is a civil action wherein plaintiff, as beneficiary, seeks to recover treble damages allegedly resulting from the acts and omissions of the defendants in issuing a life insurance policy ostensibly covering plaintiff's wife.

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The pertinent allegations in plaintiff's complaint, except where quoted, are summarized herein: plaintiff Bill Canady is the owner of Quality Pillow Limited. Defendants contacted plaintiff "for the purpose of providing insurance coverage to Quality," and presented a plan that included medical, life, and accidental death coverage. Doris Canady, plaintiff's wife and Vice-President of Quality Pillow, was ostensibly covered under the plan, and plaintiff was her designated beneficiary. Mrs. Canady died in a car accident in July 1981, and plaintiff filed a claim for \$50,000 with Equitable Life Assurance Society of the United States, "the insurance company which was provided to the Plaintiff by the Defendants." The insurance company denied the claim. Plaintiff further alleged the following:

(6) The Defendants at no time indicated to the Plaintiff that coverage of Doris Canady was dependent on Doris Canady working 20 hours or more per week;

...

(8) That coverage was provided to Doris Canady when the Defendants knew that she was a full time employee of another corporation;

...

(14) The Defendants knew that the coverage which they were providing on the life of Doris Canady was questionable and could be denied. . . .

(15) The Defendants knew or should have known that Doris Canady could have been covered under a family plan with Bill Canady;

(16) The Defendants intentionally failed to inform Bill Canady that the coverage provided to Doris Canady would fail and be denied for the sole purpose of selling a policy to Quality;

(17) The acts of the Defendants constitute unfair business practices under the laws of the State of North Carolina and entitle Bill Canady to treble damages and reasonable attorney's fees under Chapter 75 of the General Statutes.

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Defendants filed an answer in which they admitted that Mrs. Canady was plaintiff's wife and Vice-President of Quality Pillow, that she died in July 1981, that plaintiff was her designated beneficiary, and that Equitable denied plaintiff's claim for benefits under the policy. Defendants denied that they knew the coverage on Mrs. Canady was "questionable," and that they intentionally failed to inform plaintiff of this fact. Defendants further responded that, while they did not recall discussing with plaintiff the requirement that all persons eligible for coverage work at least twenty hours per week, this eligibility requirement was clearly set out in "certificate booklets" furnished to plaintiff by defendants "for distribution to all employees of Quality who were to be covered."

On 25 July 1983 defendants filed a motion for summary judgment, contending that "the pleadings and discovery filed in this cause demonstrate conclusively that either that [sic] Doris L. Canady did work the requisite number of hours or that the number of hours worked by Doris L. Canady was misrepresented to the defendants." Defendants' motion for summary judgment was supported by the following materials:

1. A judgment entered 5 January 1983 in United States District Court, Western District, in the case of *Bill R. Canady v. The Equitable Life Assurance Society of the United States*, granting summary judgment for Equitable "because the purported insured, Doris Canady, was not an employee eligible for coverage under the terms of the group insurance plan issued by the Defendant to Quality Pillow, Ltd."
2. Defendants' First Set of Requests for Admissions to Plaintiff.
3. Excerpts from a deposition of plaintiff taken in connection with the suit brought by plaintiff in federal court.
4. The verified complaint filed by plaintiff in connection with the suit brought by plaintiff in federal court.
5. A copy of a form termed an "acceptance and payroll deduction authority," that bears what appears to be Doris Canady's signature.
6. Affidavits by each defendant.

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Plaintiff opposed defendants' motion for summary judgment with two affidavits, one signed by him and one signed by Crystal Travis, Quality Pillow's office manager. On 10 September 1983 the court entered summary judgment for both defendants. Plaintiff appealed.

Curt J. Vaught for plaintiff, appellant.

Fairley, Hamrick, Monteith & Cobb, by S. Dean Hamrick, for defendants, appellees.

HEDRICK, Judge.

Assuming *arguendo* that plaintiff, as beneficiary of the life insurance policy issued on the life of his wife, has alleged a claim for relief against these defendants for unfair business practices under N.C. Gen. Stat. Sec. 75-1.1, fraud, or negligence, we hold the trial court properly entered summary judgment for the defendants. When the defendants, in support of their motion for summary judgment, filed evidentiary matter establishing that they had no knowledge that plaintiff's wife worked less than twenty hours per week for Quality Pillow, the burden shifted to the plaintiff to file evidentiary matter tending to show that the defendants *did* have such knowledge, since plaintiff's entire claim is based on his contention that defendants owed him a duty of advising him that coverage of his wife under the circumstances was "questionable." Plaintiff's burden, under the circumstances of this case, is not satisfied by his own affidavit, which fails to address the material issue of whether defendants had knowledge of facts rendering coverage of Mrs. Canady questionable. Allegations in the affidavits filed by plaintiff, bringing into question whether Mrs. Canady actually signed the insurance form submitted into evidence by defendants, do not raise a material issue of fact as to defendants' duty to inform plaintiff that coverage on Mrs. Canady was "questionable." Finally, we note that plaintiff, as President of Quality Pillow and husband of the deceased, was in a much better position than defendants to know whether his wife worked less than twenty hours a week so as to render her ineligible for coverage under the policy. We further note that, in the action brought by plaintiff in federal court, plaintiff repeatedly contended his wife was eligible under the policy because she worked for Quality Pillow more than twenty hours a week. Plaintiff will

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not now be heard to claim that defendants breached any duty by failing to inform him that her coverage was "questionable" because she worked fewer than twenty hours per week. In our opinion, the record establishes an insurmountable bar to any claim against these defendants for violation of N.C. Gen. Stat. Chap. 75, fraud, or negligence. Summary judgment for defendants is

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

I agree that under the circumstances recorded it was incumbent upon the plaintiff to come forward and show that he had evidence that defendants knew what Mrs. Canady's situation was and that they were obligated to obtain a policy that covered it, and that plaintiff's affidavits failed to make any such showing. But that plaintiff was in a better position than defendants to know what Mrs. Canady's situation was and apparently told a different story when he sued the insurance company in federal court has nothing whatever to do with the question before us, in my opinion. Such matters relate only to plaintiff's credibility, which is not for us to determine.

DAVID B. GILBERT v. NELL H. GILBERT

No. 8314DC1183

(Filed 6 November 1984)

Divorce and Alimony § 16.9— alimony—transfer of real property other than to secure payment—improper

The trial court improperly ordered conveyance to the defendant wife of an interest in the marital home and other real estate where none of the considerations given in the judgment indicated that the judge feared that alimony payments would not be made. The transfer of real property referred to in G.S. 50-16.1(c) incorporates subsection (b) of the statute and enables the court to

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order a transfer of title to real property only to secure payment of an award of alimony made under G.S. 50-16.1(a).

APPEAL by plaintiff from *LaBarre, Judge*. Judgment entered 14 June 1983 in District Court, DURHAM County. Heard in the Court of Appeals 30 August 1984.

This case involves a dispute over an alimony award. The plaintiff, David Gilbert, and the defendant, Nell Gilbert, were married on 20 June 1962. They have three children. During the early years of their marriage David Gilbert was a student in medical school. Nell Gilbert taught school until their first child was born. The family moved to Durham, North Carolina, in June 1969 when Dr. Gilbert accepted employment at the Duke University Medical Center.

The Gilberts acquired both real and personal property during the course of their marriage. Their property included the marital home, at 3212 Pinafore Drive, Durham, and a lot at Kerr Lake, both titled in David Gilbert's name. They also acquired shares of stock, some titled jointly, and others titled individually.

During the mid-1970's, the Gilberts' marriage deteriorated. They both underwent counselling, but this was to no avail. On 4 February 1978, Dr. Gilbert moved from the marital home to an apartment. He and Mrs. Gilbert have not lived together since. In August 1978, Mrs. Gilbert took a teaching job at Hope Valley School.

On 5 February 1979 Dr. Gilbert filed a complaint seeking divorce based on a one-year period of separation from Mrs. Gilbert. Judgment of absolute divorce was entered 15 June 1979, preserving the questions of child custody, alimony, alimony pendente lite, attorneys' fees, and possession of the marital home.

On 11 November 1979, an order was entered awarding the parties joint custody of the three minor children and providing for their support. The order also provided for alimony pendente lite, attorneys' fees, and possession of the marital home by the wife and children.

A jury trial held in December 1981 on the wife's claim for alimony based on abandonment resulted in a mistrial.

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In March 1982, an order was entered increasing the amount of alimony pendente lite (Mrs. Gilbert had lost her teaching position) and decreasing the amount of child support (the oldest child having become emancipated). A further motion reducing the child support payments was made when the second child, William, began residing with his father.

By agreement, a trial to the court without a jury on the wife's alimony claim and the motion for a reduction in child support was held in May 1983. In the judgment entered 14 June 1983, Nell Gilbert was awarded permanent alimony (at the 7 April 1982 level); \$10,000 in lump-sum alimony; a one-half interest in the marital home; the greater of \$900 or one-half the value of additional real estate owned by Dr. Gilbert; and one-half of all jointly-owned stocks or the cash equivalency thereof. The court found no substantial change of circumstances that would justify modification of the April 1982 child support order. From the judgment as to the alimony award, the plaintiff appeals.

Maxwell, Freeman, Beason and Morano, by James B. Maxwell, for plaintiff appellant.

Mount, White, King, Hutson & Carden, by William O. King and Elizabeth R. Stuckey, for defendant appellee.

ARNOLD, Judge.

Plaintiff first contends that the order that a one-half interest in the marital home be conveyed to defendant was beyond the authority of the trial judge. Although the North Carolina statutes and decisions may not be entirely clear on this question, *see, e.g., Taylor v. Taylor*, 26 N.C. App. 592, 216 S.E. 2d 737 (1975); *Spillers v. Spillers*, 25 N.C. App. 261, 212 S.E. 2d 676 (1975); *Clark v. Clark*, 44 N.C. App. 649, 262 S.E. 2d 659, *modified*, 301 N.C. 123, 271 S.E. 2d 58 (1980), we find on considering them and the basic purposes of the alimony statute that the trial judge did not properly order conveyance to the defendant of an interest in the marital home and other real estate.

The purpose of alimony is to provide support and maintenance for the dependent spouse. G.S. 50-16.1. "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, ac-

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customed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a).

The methods of structuring and enforcing payment of alimony are set out in G.S. 50-16.7 (1976). Subsection (a) provides:

Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, *or a security interest in or possession of real property*, as the court may order. In every case in which either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance. (Emphasis added.)

This part of the statute makes no mention of a transfer of title to real property and, as plaintiff argues, it appears to exclude by implication an order of such a transfer as part of the alimony award.

This subsection, however, must be read with the rest of the statute. Subsections (b) and (c) state that:

(b) The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

(c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite as provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

Admittedly, subsection (c) appears to conflict with subsection (a), in that it allows the court to transfer real property as part of the alimony award. We note, however, that in (c) "transfer" is modified by "as provided in subsection (a) or for the securing thereof." This limits the transfer to one of a security interest in or possession of real property. The second phrase "or for the securing thereof" refers back to subsection (b). We do not read

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subsections (b) and (c) as enlarging the authority given the trial judge in subsection (a). Rather, these subsections enable the court to order a transfer of title to real property to secure an award of alimony made under subsection (a). Thus, the trial judge may order the transfer of title to real property, but only if it is necessary to insure the payment of alimony.

In the case at bar, the trial judge did not find sufficient facts to support the conveyance of a half interest in the marital home and other real estate as security for the payment of alimony. He wrote, in his judgment of 14 June 1983:

32. Considering the estate, earnings and positions of the parties, education, defendant's inability to be self-sufficient, the depletion of defendant's estate, the insecurity of defendant's future with respect to real estate which was acquired with funds and financial commitments of both parties but which was deeded only to plaintiff, and considering the circumstances of the separation, defendant is entitled to a lump sum payment of alimony, a one-half interest in the Pinafore Drive home, an interest in the equity of the Kerr Lake property, attorney's fees, an interest in jointly held stock, and permanent alimony. Plaintiff is healthy, able-bodied, and has an outstanding income and excellent income capacities. He possesses the means and abilities to provide the support which will be more particularly set out below.

None of the considerations given indicate that the judge feared that the alimony payments would not be made. The "insecurity of defendant's future" with respect to the real estate is not a proper reason for securing the alimony award now. The trial judge can adjust the alimony award in the future to meet the need for large financial commitments, such as a down payment on a new house when the writ of possession expires, that might occur then. If the trial judge believed that there were reasons, financial or otherwise, to suspect that the alimony payments would not be made in full, then he should have set them out specifically as grounds for the transfer of title to secure the alimony award.

The alimony statute, G.S. 50-16.7, authorizes the trial judge to order lump sum alimony payments and the transfer of title to personal property. In the case at bar, the trial judge did not

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abuse his discretion in awarding the \$10,000 lump sum payment or in transferring an interest in jointly-owned stock.

In light of the conclusions above, we see no point in addressing the issue of whether service of the plaintiff's proposed record on appeal was timely.

The trial judge's order is accordingly vacated as to the conveyance of a half interest in the marital home and other real estate, and remanded for further findings in accordance with this opinion, if the trial judge determines they are appropriate. The order is affirmed as to the other matters addressed in it.

Affirmed in part and vacated and remanded in part.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. GEORGE RICO RAY

No. 8418SC148

(Filed 6 November 1984)

1. Constitutional Law § 30; Bills of Discovery § 6— failure to conduct in camera examination of prosecution's file

The trial court did not err in failing to conduct an *in camera* examination of the prosecution's file to determine whether the file contained a prior inconsistent statement by a State's witness to the police which defense counsel allegedly had seen in the file where the prosecutor stated that the State had no such statement, the witness denied making such a statement to the police, and nothing in the record substantiated defendant's claim that evidence favorable to him was suppressed.

2. Criminal Law § 89.2— corroboration of witness—showing of other unauthorized transactions

In a prosecution for obtaining property by false pretense by the unauthorized use of a credit card, the trial court did not abuse its discretion in permitting the State to corroborate the card owner's testimony by introducing a summary of charges to her account which showed unauthorized transactions in addition to the ones at issue where the State presented no evidence connecting defendant with any transaction on the summary other than the ones for which he was being tried.

Judge WELLS dissenting.

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APPEAL by defendant from *Hairston, Judge*. Judgment entered 8 March 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 October 1984.

Defendant was convicted of false pretenses and was sentenced to six years imprisonment. From the judgment entered he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Appellate Defender Adam Stein by James R. Glover, Director, Appellate Defender Clinic, for defendant appellant.

HILL, Judge.

In relevant part, the evidence for the State tended to show that on 3 November 1981, a man and two women entered the Record Bar at Four Seasons Mall in Greensboro. The sales clerk, William Cook, testified that the man made two separate purchases totaling \$58.76 and paid for them with a Visa credit card issued in the name of Carrie Steele. The clerk did not call for authorization to charge the purchases nor did he ask for identification because the amount involved was small.

In addition to the Record Bar transactions, which were the subject of the indictment, the State offered evidence that on the same day a man and two women used the same Visa card to make a second set of purchases at Webster's Menswear, a clothing store in Four Seasons Mall. In those transactions State's evidence showed that one of the two women presented the card to the clerk to pay for the purchases and signed the slip.

Carrie Steele, a resident of Columbia, South Carolina, owned the Visa card used to make the described purchases. When she received a statement dated 11 November 1981 for charges on her Visa that she had not made, she reported her card as lost or stolen. At trial Carrie Steele testified that she had last seen her credit card in October at a department store in Columbia, South Carolina, that she had not made the purchases at the Record Bar or Webster's Menswear and that the signature on the charge slips was not hers.

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After Carrie Steele reported the missing card, Atlantic States Bank Card Association, a processing center for bank credit cards, began an investigation. On 21 December 1981, investigators showed a photo array to William Cook who identified the defendant as the man who made the Record Bar purchases with the Visa card issued to Carrie Steele. The Webster's Menswear clerk and assistant manager similarly identified defendant from a photo array as the man with the two women when the 3 November 1981 purchases were made at their store. At trial the State offered into evidence the 11 November 1981 statement of charges to Carrie Steele's Visa account which showed a series of unauthorized transactions in addition to the ones at Record Bar and Webster's Menswear.

[1] Defendant assigns as error that the trial court failed to order the State upon request by defense counsel to produce for defendant's inspection, or in the alternative inspection by the court *in camera*, a portion of the State's file which allegedly contained the transcription of a prior inconsistent statement made by a witness for the State. Defendant claims they needed the requested material so that they could properly impeach the State's witness.

At trial William Cook testified for the State concerning the 3 November 1981 purchases allegedly made by the defendant. He testified that it was the defendant who presented the card for payment and the defendant who signed the sales slip. Counsel for the defendant claimed that some months before trial and in preparation for trial he had viewed a case summary prepared by the Greensboro Police Department and given him by the prosecution. Counsel claimed that he had made notes from the summary indicating that Cook had told investigators that the "girlfriend" was the one using the Visa and she had signed the slip.

On voir dire defense counsel asked the State to produce for the court's inspection any prior statements in their possession made by William Cook. The State responded that they had no prior statements recorded or written of Mr. Cook. Further, Cook testified that he had not talked to any member of the Greensboro Police Department about the transaction. The court responded, "unless you (defense counsel) can show that [the prosecutor] is not telling me the truth, in which case you've entered a very serious

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accusation against an officer of this Court, I'm going to deny your motion."

Upon specific request the prosecutor is constitutionally required to disclose at trial evidence that is favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963); *U.S. v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). In *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), our Supreme Court held that in North Carolina, the court should view the requested evidence *in camera* to determine if it is material and favorable. If the court determines the requested evidence is relevant and competent it is made available to defendant. If the court after the *in camera* examination rules against the defendant and his motion, the court should order the sealed statement placed in the record for appellate review. *Hardy*, *supra* at 128.

In the present case, we find that the court's rulings on defendant's requests for production of evidence were not in error. The court did all that it could reasonably do to ascertain if the material requested by defendant existed. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031, 103 S.Ct. 839 (1983). Nothing in the record substantiates defendant's claim that evidence favorable to him was suppressed. Defendant has made no showing of prosecutorial misbehavior nor has he presented any evidence that State's witness, William Cook, changed his story in court. On the basis of the record we cannot say that the requested material even existed. Absent some proof that the requested statement existed and was improperly suppressed at trial, this Court must affirm the ruling of the trial court.

[2] Next defendant contends that the trial court erred when it admitted into evidence the summary of charges made to the Visa account which recorded unauthorized transactions other than the ones at issue. At trial Carrie Steele testified that when she received the monthly summary of charges made on her Visa card she noticed that it listed unauthorized charges. She then reported her card lost or stolen.

The State offered the summary of charges containing the unauthorized transactions in corroboration of Carrie Steele's testimony. Defendant objected claiming that because the summary

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contained evidence of a series of unauthorized transactions which took place after the card left Carrie Steele's possession its admission into evidence would improperly suggest defendant was responsible for additional crimes.

The trial judge has discretion to control how far the parties may go in corroborating witnesses in collateral matters. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). A ruling by the trial court on an evidentiary point is presumptively correct and counsel asserting prejudicial error must demonstrate that the particular ruling is in fact incorrect. *State v. Milby and State v. Boyd*, 302 N.C. 137, 273 S.E. 2d 716 (1981).

In the present case, the record is devoid of any indication that the court abused its discretion. When defendant objected to the admission of the evidence, the court held a voir dire where they decided that the summary would be admitted into evidence with a limiting instruction. The State entered the summary into evidence and the court cautioned the jury to consider it only for the purpose of corroborating Carrie Steele's testimony. The record shows the State presented no evidence connecting defendant with any transaction on the summary other than the ones at Record Bar and Webster's Menswear. Because we find the State presented no evidence that the defendant committed other crimes we affirm the ruling of the trial court.

Defendant also complains that testimony by an investigator for the credit card company improperly suggested that defendant committed crimes not charged. The investigator testified that during his investigation to determine who was wrongfully using Mrs. Steele's credit card, he talked to numerous merchants requesting they describe the Visa card user. Defendant objected to the testimony and the court instructed the witness to confine his remarks to the transactions at issue.

The court allowed the witness to testify only about the transactions at Record Bar and Webster's Menswear. No witness testified that defendant was connected with any other fraudulent transactions. We fail to see how this testimony improperly prejudiced the defendant.

For the reasons enunciated herein, we find the defendant to have had a fair trial, free from prejudicial error.

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No error.

Judge ARNOLD concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In am persuaded that defendant was entitled to have the trial court conduct an *in camera* examination of the prosecution's file to determine if the exculpatory statement alleged by defendant to have been seen previously by defendant's counsel was in the file.

Additionally, I am persuaded that the trial court erred in allowing the state to "corroborate" Ms. Steele's testimony as to the unauthorized charge against her credit card defendant was tried for by introducing a long list of other unauthorized charges not connected to defendant.

I vote for a new trial.

STATE OF NORTH CAROLINA EX REL. LIZANNA THORNE TERRY, PHYSICAL CUSTODIAN, INDIVIDUALLY AND AS PHYSICAL CUSTODIAN AND AS NATURAL GUARDIAN OF WILLIE, A MINOR CHILD v. JAMES MARROW

No. 849DC22

(Filed 6 November 1984)

Bastards § 10; Social Security and Public Welfare § 2— illegitimate child—recovery from father of A.F.D.C. payments made before father's knowledge of birth of child—proper

In an action against defendant father to recover monies paid under an Aid For Dependent Children Program, the State is entitled to recover for public assistance paid before service of a summons and complaint to establish paternity, compel reimbursement, and provide for future support of the child; before defendant had knowledge of the birth of his child; and before demand was made upon him to support the child. The only limitations in G.S. 110-135 relate to defendant's ability to furnish support. G.S. 49-15, G.S. 110-128.

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APPEAL by plaintiff from *Allen, Judge*. Judgment entered 12 September 1983 in District Court, WARREN County. Heard in the Court of Appeals 16 October 1984.

This is an action by the State to recover from the defendant monies paid under an Aid For Dependent Children program to Lizanna Thorne Terry as mother of Willie Lewis Thorne, an illegitimate child born 22 February 1970. Summons and complaint were filed 30 March 1982, and defendant was served 5 April 1982. The defendant filed answer alleging, *inter alia*, a denial of paternity and that neither plaintiff nor the child's natural mother had made demand on the defendant for support of the child. At trial on 12 September 1982, the trial judge made the following pertinent findings of fact:

5. That on or about October 4, 1982, the Defendant, James Marrow, together with Lizzie Mae Thorne (Jordan) and Willie Lewis Thorne submitted themselves to Duke Medical Center Blood Bank for blood analysis and comparison test. That the results of said blood tests and comparison established that there was a 99.98% probability that James Marrow is the natural father of the minor child, Willie Lewis Thorne.

6. That on the 9th day of December, 1982, Ben U. Allen, Judge Presiding, entered an Order in this Cause adjudicating James Marrow to be the natural father of the minor child, Willie Lewis Thorne.

. . .

9. That on the 9th day of June, 1983, the Honorable J. Larry Senter, Judge Presiding, entered an Order in this Cause whereby Judgment was entered for Plaintiff against Defendant for the sum of \$4,294.87 for indemnification for public assistance previously paid for the benefit of Defendant's minor child. On the 27th day of July, 1983, the Honorable J. Larry Senter, Judge Presiding, vacated that Order entered previously on June 9, 1983, upon being advised that Ben U. Allen, District Court Judge, had retained under advisement the issue of whether or not Defendant was responsible for satisfying any debt created by the payment of public assistance to the minor child prior to April 5, 1982.

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10. That Lizzie Mae Thorne (Jordan), the natural mother of the minor child, Willie Lewis Thorne, has not requested the Defendant, James Marrow, to support said minor child. Further, Defendant has not provided to the natural mother support for said child.

11. That the Warren County Child Support Enforcement Agency has written the Defendant, James Marrow, on several occasions, the first occasion being October 15, 1981, regarding the fact that he had been named as the father of the minor child and regarding his obligation to support said minor child in the event it was established that he was the father of said child. The Defendant, James Marrow, has not responded to said letters. The Court specifically finds as a fact that Plaintiff did not demand support from Defendant for his minor child until April 5, 1982.

12. That the minor child, Willie Lewis Thorne, received public assistance from the 1st day of July, 1975 until said public assistance was terminated on the 30th day of March, 1982. The total amount of public assistance paid to, or for the benefit of, said minor child is \$4,294.87.

13. That the Defendant, James Marrow, is an abled-bodied man, presently serving in the United States Army, and having served in the United States Army since the 1st day of November, 1969, and is capable of providing support for his minor child.

Based on the foregoing findings of fact the court made the following conclusions of law:

2. That the Defendant, James Marrow, as the natural father of the minor child, Willie Lewis Thorne, has an obligation to provide support and maintenance for said minor child.

3. That demand for payment by Defendant for support of his minor child and for indemnification for public assistance previously paid was not made on Defendant until he was served with Summons and Complaint in this Cause on April 5, 1982.

4. That the Defendant, James Marrow, as the natural father of the minor child, Willie Lewis Thorne, is obligated to

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indemnify Plaintiff for public assistance paid subsequent to April 5, 1982.

The trial judge thereupon entered judgment for the State requiring the defendant to pay into the office of the Clerk of the Superior Court \$100.00 per month, \$25.00 of which was to be paid the Department of Human Resources as reimbursement for payments made to the mother on and after 5 April 1982, the day defendant was served with summons and copy of complaint. The State appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Clifton H. Duke and Marvin P. Rooker for plaintiff appellant.

Frank W. Ballance, Jr., P.A., by Ronnie C. Reaves for defendant appellee.

HILL, Judge.

The State contends that by the authority of G.S. 110-135 it is entitled to recover from defendant reimbursement for public assistance paid for the benefit of his minor child prior to the service of a summons and complaint to establish paternity, compel reimbursement for the public assistance debt, and provide for the future support of the child. On the other hand, defendant contends the trial court was correct in ruling that the State was not entitled to recover from him for benefits paid for the benefit of his minor illegitimate son before he had any knowledge of the birth of his son and before demand was made upon him to support the child. He points out that the first notice he had that he was the alleged father was from the Warren County Child Support Enforcement Agency on 15 October 1981, almost 12 years after the birth of the child. We conclude the trial court erred and reverse its judgment.

The Child Support Enforcement Program was established by the State on adhering to the Congressional mandate that required each state to implement the program. The aim of the program is to offset welfare costs by strengthening the State's efforts to enforce child support obligations. See 42 U.S.C. § 651 *et seq.* The North Carolina Legislature implemented the program through Ar-

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ticle 9 of Chapter 110 of the General Statutes. G.S. 110-128 addresses the broad purposes of this Article:

The purposes of this Article are to provide for the financial support of dependent children; to provide that public assistance paid to dependent children is a supplement to the support required to be provided by the responsible parent; *to provide that the payment of public assistance creates a debt to the State; to provide that the acceptance of public assistance operates as an assignment of the right to child support*; to provide for the location of absent parents; to provide for a determination that a responsible parent is able to support his children; *and to provide for enforcement of the responsible parent's obligation to furnish support* and to provide for the establishment and administration of a program of child support enforcement in North Carolina. (Emphasis added.)

In *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976), our Supreme Court dealt, in part, with a civil reimbursement claim by the mother of an illegitimate child. The following language in the opinion is instructive:

The duty of the father of an illegitimate child to support such child is not created by the judicial determination of paternity. That determination is merely a procedural prerequisite to the enforcement of the duty by legal action. The father's duty to support his child arises when the child is born.

Id. at 116, 225 S.E. 2d at 827. The *Tidwell* court recognized the right of a custodial parent to compel reimbursement for expenditures incurred in support of the child as well as the mother's right to judgment requiring reimbursement by the child's father as a liability created by G.S. 49-15.

When the State has been compelled by a parent's default to make Aid For Dependent Children payments for a minor child, G.S. 110-135 provides that an action to compel reimbursement of the debt created must be commenced within "five years subsequent to the receipt of the last grant of public assistance." An action to collect a public assistance debt, if timely filed, may claim

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all public assistance granted subsequent to 30 June 1975, provided there is no five year gap in payments.

The only limitations in G.S. 110-135 on the extent of reimbursement for which judgment may be obtained relate to the defendant's financial ability to furnish support during the relevant period of time. In the case under review, the trial court found the defendant to be "an abled-bodied man, presently serving in the United States Army, and having served in the United States Army since the 1st day of November, 1969, and . . . capable of providing support for his minor child." The trial judge further found that the child had received \$4,294.87 since 1 July 1975 through 30 March 1982. No exception was taken to these findings. Over an 81 month period the average monthly payment would have been \$53.00 per month, an amount well within defendant's ability to pay.

The judgment of the trial court is vacated and the cause remanded to the trial court with instructions to enter a judgment in accordance with the terms of this opinion.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

THADDEUS SEXTON, JR. v. ROLAND A. BARBER

No. 8312DC1147

(Filed 6 November 1984)

1. Evidence § 45; Automobiles and Other Vehicles § 45— opinion of value of automobile before and after collision—admissible

In an action for damages arising from an automobile collision, there was no error in the admission of a witness's opinion as to the value of plaintiff's automobile before and after the collision where the witness testified that he had been in the automobile business for thirty-one years, had appraised the value of the automobile just prior to the collision during trade-in negotiations, was familiar with the damage done in the collision, and had knowledge based on his experience as a car dealer of the value of the car after the collision.

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2. Evidence § 50.2— medical opinion of disability—preexisting condition not distinguished—no error

There was no error in the admission of the opinion of a medical expert as to plaintiff's disability when the expert did not distinguish plaintiff's preexisting condition. The proper remedy for defendant was cross-examination.

3. Evidence § 34.6; Automobiles and Other Vehicles § 45— physician's opinion of plaintiff's pain—based in part on plaintiff's statements—admissible

In an automobile accident case tried without a jury, a medical expert's opinion about plaintiff's pain had an adequate foundation and was admissible where the witness based his opinion on more than just the statements of plaintiff and plaintiff's statements to the witness were made for the purposes of diagnosis and treatment. Furthermore, the court's findings were supported by competent evidence and it is presumed that the trial court considered only competent evidence.

APPEAL by defendant from *Cherry, Judge*. Judgment entered 18 May 1983 in District Court, CUMBERLAND County. Heard in the Court of Appeals 28 August 1984.

This is a civil action in which plaintiff, Thaddeus Sexton, Jr., seeks damages from defendant, Roland A. Barber, for injuries resulting from the negligence of the defendant arising out of an automobile collision in Fayetteville, North Carolina.

At the 16 May 1983 Civil Session of the District Court of Cumberland County, the case was tried without a jury by stipulation on the issue of damages only.

The evidence offered at trial tended to show that plaintiff was operating his automobile along Gruber Road on the Fort Bragg Military Reservation when there was a collision with the defendant's automobile. Plaintiff suffered various injuries to his neck, chest and arm, all of which were treated by his physician.

Plaintiff offered evidence in his case-in-chief that he had missed several days of work, but had lost no income. He also testified as to a pre-existing back injury that was aggravated by the collision. Plaintiff offered further evidence as to his injuries through the testimony of Dr. Byer, a Fayetteville physician who treated plaintiff following the collision.

Plaintiff also offered evidence as to the value of his automobile before and after the collision through his witness Harold Holmes.

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Defendant offered no evidence but did cross examine plaintiff and his witnesses.

From the verdict, judgment entered and final order awarding damages in the amount of \$5,000, the defendant appeals. He assigns as error the admission of certain testimony as to the value of plaintiff's automobile and the opinion of the medical expert as to disability and pain suffered by plaintiff.

Canady, Person and Britt, by N. H. Person and Carl L. Britt, Jr., for plaintiff-appellee.

Nance, Collier, Herndon & Wheless, by James R. Nance, Jr., for defendant-appellant.

EAGLES, Judge.

I.

[1] Defendant first assigns as error the admission into evidence of plaintiff's witness's testimony as to the value of plaintiff's automobile before and after the collision. The basis of this assignment of error is that the witness, Harold Holmes, had no personal knowledge of the facts. We disagree.

The evidence offered at trial by the witness, Harold Holmes, indicated that he had been in the automobile business for thirty-one years, that he was familiar with the vehicle in question, and that he had recently appraised its value at \$5,800.00 during trade-in negotiations with plaintiff just prior to the collision. He also testified that he was familiar with the damage done to plaintiff's vehicle as a result of the collision and had knowledge, based on his experience as a car dealer, of the value of the car after the collision. He testified the car was then worth \$4,500.00, considering the repairs that had been made since the collision.

A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific personal property. See, *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968); 1 Stansbury, North Carolina Evidence, Section 128 (Brandis Rev. 1982). Here, the witness had experience as a car dealer and information gained as to the automobile in question as a result of his observation and negotiations

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in regard to that particular automobile. It was not error to admit the witness's opinion testimony.

II.

[2] Defendant next assigns as error the admission into evidence of the opinion of a medical expert as to plaintiff's disability where there was no distinction made regarding a pre-existing condition. We find no error.

Plaintiff's witness, Dr. Byer, was a medical expert who examined the plaintiff, took x-rays of his injuries, diagnosed his injuries, prescribed medicine for him and later saw him on a follow-up examination. In a deposition, Dr. Byer testified that plaintiff was disabled for approximately three weeks. A medical expert may give his opinion as to the condition of a person's body, percentage of disability or the condition of the patient's mental capacity on the basis of probabilities based upon the medical expert's examination and diagnosis. See, Stansbury, North Carolina Evidence, Section 135 (Brandis Rev. 1982). Here, defendant complains that the medical expert did not distinguish plaintiff's pre-existing disability. The proper remedy for defendant is cross examination of the plaintiff's witness. Our examination of the record reveals no error in the admission of the medical testimony.

III.

[3] Defendant next assigns as error the admission into evidence of the opinion of the medical expert as to plaintiff's pain without an adequate factual foundation. We find no error.

Defendant contends that the mere hearsay statements of the plaintiff made to his medical doctor were insufficient for the doctor to form an opinion as to plaintiff's pain. However, the medical witness testified, based upon the known medical history of the plaintiff and his observation, examination and treatment of the plaintiff, that it was his opinion that the plaintiff suffered pain. Therefore, the medical witness based his opinion on more than just statements of the plaintiff.

The record indicates that the plaintiff did tell the medical witness he had pain. At the time they were made, the statements of the plaintiff were made for the purposes of diagnosis and treatment of injuries received in the collision. While these statements

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of the plaintiff in another context would be hearsay, the statements take on new significance when they are made to a treating physician and form the basis of a medical expert's opinion.

A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied to him by others, including the patient, if the information is inherently reliable even though it may not be independently admissible into evidence. If the expert's opinion is admissible, the expert may testify to the information relied on in forming it for the purpose of showing the basis of the opinion. *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979).

The reliability of plaintiff's statement to his physician arises from the fact that the statements were made in the course of professional treatment and with a view of effecting a cure. The record discloses no reason why the medical witness's opinion should not have been admitted. There was no error in admitting Dr. Byer's opinion as to the plaintiff's pain.

Finally, we note that findings of fact made by the trial court sitting without a jury are conclusive on appeal if supported by competent evidence, and it is presumed that the trial court considered only the competent evidence and discarded the rest. *Ayden Tractors, Inc. v. Gaskins*, 61 N.C. App. 654, 301 S.E. 2d 523, *rev. denied*, 309 N.C. 319, 307 S.E. 2d 162 (1983). Our examination of the record indicates that the findings of fact made by the trial court are based on competent evidence and that the defendant's assignments of error are without merit.

Affirmed.

Judges ARNOLD and WHICHARD concur.

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STATE OF NORTH CAROLINA v. FREDDIE DELANE GILCHRIST

No. 8414SC100

(Filed 6 November 1984)

1. Narcotics § 3.1— reliability of informant—irrelevant when officer's testimony about defendant based on personal observation

In a prosecution for sale and delivery of cocaine and marijuana, and for possession with intent to sell, the trial court properly sustained objections to questions about the reliability or motivation of an informant because the informant's only participation in the drug transactions was to introduce an S.B.I. agent to defendant and to remain in their presence while the agent personally transacted the drug buys charged against defendant.

2. Narcotics § 3.1— officer's prior knowledge of drugs at scene of drug buy—admissible

In a prosecution for sale and delivery of cocaine and marijuana, and for possession with intent to sell, the court did not err by allowing an officer to testify that he had previously seen cocaine in a house where a drug transaction allegedly took place, although the officer may not have been qualified to identify the substance as cocaine. Evidence that the house was known to be a location where illegal drugs could be purchased was relevant and admissible to show defendant's knowledge and intent.

3. Criminal Law § 87.4— redirect examination—irrelevant information on subject raised by defendant—extraneous information—no prejudice

Where an arrest warrant was issued in the name Freddie DeWitt based on an informant's statements, and the magistrate reissued the warrant in defendant's correct name, Freddie Delane Gilchrist, after defendant's arrest, the court did not err in allowing an officer to testify concerning the statements of others about "Freddie" because defendant had already elicited testimony on the subject. The State was entitled to rebuttal, and while some of the information given on rebuttal may have been extraneous, there was no prejudice.

4. Criminal Law § 85.1— defense counsel's question to defendant regarding prior arrests and trials—properly excluded

Defendant cannot complain that testimony of his good character was excluded where his counsel asked whether he had been "arrested, tried, or convicted of anything," did not rephrase his question when given the opportunity to do so, and did not include in the record what his answer would have been.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 23 August 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 September 1984.

Defendant was convicted of sale and delivery of cocaine, possession with intent to sell cocaine, sale and delivery of mari-

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juana, and possession with intent to sell marijuana. He was sentenced to three years imprisonment with a six month active term. From the judgment entered, he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Clayton, Myrick and McClanahan, by Jerry B. Clayton and Ronald G. Coulter, for defendant appellant.

HILL, Judge.

On 24 August 1982 around 9:00 p.m. an informant known only as "Larry" introduced the defendant to Agent Gunter of the S.B.I. who was working undercover on a drug investigation in Durham. The defendant got into a car with Agent Gunter and Larry, and the three proceeded to an address where the defendant said he could get some cocaine. When the three arrived at their destination, Agent Gunter asked the defendant to get him a twenty-five dollar bag of cocaine. The defendant went into a house (hereinafter the "Carolina house") and returned with a bag of white powder which he represented to be cocaine. Agent Gunter took the bag and paid the defendant twenty-five dollars. The defendant then asked Agent Gunter if he wanted some marijuana. Agent Gunter answered affirmatively and requested a ten dollar bag. Agent Gunter, Larry and the defendant drove to another address which the defendant said was his home. The defendant went into an apartment and returned with a bag containing brown vegetable matter which he represented to be marijuana. The defendant gave Agent Gunter the bag and Agent Gunter gave him ten dollars. The encounter between Agent Gunter and the defendant lasted approximately thirty minutes. The substances were later analyzed and testimony at trial indicated that the white powder was cocaine and the brown vegetable matter was marijuana.

An arrest warrant was issued for a person named Freddie DeWitt. At trial Agent Gunter testified that the informant, Larry, told him that the defendant's name was Freddie DeWitt. Testimony at trial indicated that the Magistrate's Office re-issued the warrant with the defendant's correct name, Freddie Delane Gilchrist, on it after the arrest of the defendant.

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[1] In his first assignment of error defendant contends the trial court erred when it sustained objections to questions about the reliability or motivation of the informant known as "Larry." Defendant does not question the police officers' testimony that they could not give Larry's full name because they did not know it, thus preventing defendant from being able to find Larry and call him to the witness stand. Rather, he argues that the court should have allowed him to elicit other information concerning Larry's reliability as an informer from the State's witnesses because Larry was a participant in the alleged offenses and defendant needed this information to prepare a proper defense.

The evidence at trial shows that Agent Gunter was in the company of the defendant for approximately thirty minutes during which time the Agent personally transacted the drug buys charged against the defendant. Agent Gunter's testimony concerning his identification of defendant as the person who sold him drugs was based upon his own observations and not upon information received by him from the informant. The informant's only participation in the drug transactions concerned herein was to introduce the State's witness to the defendant and to remain in their presence while the illegal transactions occurred. Therefore, the informant's reliability or credibility was not an issue in this case. *State v. Orr*, 28 N.C. App. 317, 220 S.E. 2d 848 (1976), cited by defendant in his argument, is distinguishable on the facts from the case *sub judice* because there the defendant claimed the informant had entrapped him, thus making the informant's credibility an issue.

The prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime or unless the informant's identity is essential to a fair trial or material to defendant's defense. *State v. Beam*, 45 N.C. App. 82, 262 S.E. 2d 350 (1980). A defendant must make a sufficient showing that the particular circumstances of his case mandate disclosure before the identity of a confidential informant must be revealed. *State v. Watson*, 303 N.C. 533, 279 S.E. 2d 580 (1981). When the defendant fails to make a sufficient showing of need to justify disclosure of the informant's identity he acquires no greater rights to compel disclosure of details about the informant than he initially had. *State v. Beam*, 45 N.C. App. 82, 262 S.E. 2d 350 (1980). In the present case, the defendant has failed to

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establish that any additional information about the informant was relevant to his defense or essential to a fair determination of his case. Because the informant was not a participant in the offense and the informant's reliability or credibility was not at issue, we hold the trial court properly sustained objections to questions about the informant.

[2] In his next assignment of error, defendant argues the trial court erred in allowing Officer Edwards to testify that he had previously seen cocaine in the Carolina house where one of the drug transactions allegedly took place. In drug cases, this Court has allowed evidence concerning the reputation of a place or neighborhood when such evidence tends to show the intent of the person charged. *State v. Lee*, 51 N.C. App. 344, 276 S.E. 2d 501 (1981). In this case evidence that the Carolina house was known to be a location where illegal drugs could be purchased was relevant and admissible to show defendant's knowledge and intent at the time of the offense. Although Officer Edwards may not have been qualified to identify the specific substance seen as cocaine, the effect of his testimony was simply to establish that the Carolina house was known as a place where drugs could be bought. Therefore, we find that the admission of this testimony did not constitute prejudicial error.

[3] Next, defendant contends the trial court erred in allowing Officer Edwards to testify concerning the statements of others about "Freddie." Defendant, on cross-examination, elicited testimony from Agent Gunter and Officer Edwards concerning the use of the name "Freddie DeWitt" on the initial arrest warrant. It appears that defense counsel by delving into this subject was attempting to infer that the offense could have been committed by someone else. The State did not proceed to explain how the name "Freddie DeWitt" got on the arrest warrant until after the matter was introduced by the defendant. In *State v. Stanfield*, 292 N.C. 357, 364, 233 S.E. 2d 574, 579 (1977), our Supreme Court stated:

[Where defense counsel on cross-examination of a witness brings out evidence tending to show that someone else was suspected of committing the crime charged, the State is entitled to introduce evidence in explanation or rebuttal thereof, even though such evidence would have been irrele-

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vant had it been offered initially by the State. In such a case, the defendant has "opened the door" to this testimony and will not be heard to complain.

In the present case the State had the right to explain the evidence brought out on cross-examination by defense counsel and to rebut any negative inferences arising therefrom. While defendant may be correct in arguing that the witness gave extraneous information in his rebuttal, we do not believe the admission of such evidence prejudiced the defendant.

[4] Defendant's final assignment of error is that the trial court erred in refusing to allow him to introduce evidence of his good character. Defense counsel asked defendant while he was on the witness stand whether he had been "arrested, tried or convicted of anything." While counsel could ask about defendant's prior convictions, he could not properly inquire about prior arrests or trials. See *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976). Defense counsel was given an opportunity to rephrase his question in a more acceptable form at trial, but he failed to do so. Moreover, the record does not show what his answer would have been as is required. *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977), *overruled on other grounds*, 306 N.C. 629, 636-37, 295 S.E. 2d 375, 379 (1982). Defendant cannot complain that testimony of his good character was excluded at trial when his own counsel failed to properly elicit this information.

We hold defendant received a fair trial free from prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

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WAKE COUNTY, *EX REL.* KAREN DALE DENNING v. MICHAEL SPEIGHT
FERRELL

No. 8310DC1159

(Filed 6 November 1984)

**1. Appeal and Error § 2; Equity § 2; Estoppel § 6— laches and equitable estoppel
—failure to raise in trial court**

The defenses of laches and equitable estoppel could not be raised for the first time on appeal where they were not raised in the pleadings or presented at trial. G.S. 1A-1, Rule 8(c).

2. Bastards § 10— county's action to establish paternity—taxing of costs of blood test

The trial court had the discretion to tax the costs of a blood test to defendant in an action brought by a county for a determination of the paternity of a child and for the recovery of AFDC funds previously paid for support of the child where the court determined that defendant was the father of the child. G.S. 6-21; G.S. 8-50.1; G.S. 49-14.

APPEAL by defendant from *Creech, Judge*. Order entered 16 June 1983 in District Court, WAKE County. Heard in the Court of Appeals 28 August 1984.

Plaintiff, Wake County, on behalf of Karen Dale Denning, mother of Michelle Tonya Ferrell, filed this action against the defendant for determination of paternity of the minor child; for recovery of public assistance funds previously paid for support of the child; for medical expenses for the child during minority; for prospective child support and that the costs of the action be taxed against the defendant. The trial judge made findings of fact and conclusions of law, those which are relevant to this appeal are set forth below.

Findings of Fact:

(1) That Karen Dale Denning (Keith) . . . has received Aid to Families with Dependent Children funds from the Wake County Department of Social Services for the support and maintenance of her minor child, Michelle Tonya Ferrell.

(5) That public assistance has been expended for the support and maintenance of the minor child, Michelle Tonya Ferrell in the amount of \$8,714.00 during the time periods listed as follows: September, 1975 through October, 1978; December,

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1979 through July, 1980; and December, 1980 through July, 1981.

(6) That Karen Dale Denning (Keith) expended \$270.00 for the blood test pursuant to the [court] order dated March 2, 1982.

(15) That the Defendant was financially able to furnish support for his minor child, Michelle Tonya Ferrell, during the time periods within which public assistance was paid for the support and maintenance of the child.

From these findings, the trial judge found the following conclusions of law:

(1) That the Defendant owes a debt to the State in the amount of \$8,714.00 for the public assistance paid for the support and maintenance of his minor child, Michelle Tonya Ferrell.

(2) That \$83.00 every two weeks is an ample and reasonable amount for the Defendant to pay for the support and maintenance of his minor child, Michelle Tonya Ferrell.

(3) That there is good cause to require the Defendant to repay the costs expended for the blood test.

Based upon these findings of fact and conclusions of law, Judge Creech ordered the defendant to pay \$20.00 every two weeks until his debt to the state was fully repaid and to pay Karen Dale Denning (Keith) \$270.00 as repayment of the costs of the blood tests. Defendant only appeals from these two orders of the trial court.

Wake County Attorney's Office, by Assistant Wake County Attorney Corinne G. Russell, for plaintiff appellee.

David H. Rogers, Esquire, for defendant appellant.

JOHNSON, Judge.

Defendant contends the trial court erred in decreeing that the defendant owes the State of North Carolina \$8,714.00 for public assistance paid as support for Michelle Tonya Ferrell. This Court notes from the outset that the State's right to collect public

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monies expended through Aid to Families with Dependent Children for child support was legislatively created 1 July 1975. G.S. 110-128 *et seq.* The statute has the effect of subrogating the State to the rights of the dependent spouse to collect up to the amount expended.

[1] Defendant argues on appeal that the doctrines of laches and equitable estoppel bar the State from initiating this action to collect funds expended six years prior. The doctrines of laches and equitable estoppel are affirmative defenses that must be set forth in the pleadings at trial. G.S. 1A-1, Rule 8(c), Rules of Civil Procedure. We have fully reviewed the record and fail to find any evidence that the defenses were raised in the pleadings or presented at trial. The issues may not now be raised for the first time on appeal. *Starling v. Sproles*, 69 N.C. App. 598, 318 S.E. 2d 94 (1984).

[2] Defendant also contends that the court erred in requiring repayment of the costs of the blood tests. We disagree. The determination of this issue can only be resolved by reviewing the following three statutes: G.S. 8-50.1; G.S. 6-21; and G.S. 49-14, which speak to the question of illegitimate children and the taxing of the expense of blood tests as costs.

It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, i.e., which relate or are applicable to the same matter or subject, although enacted at different times must be construed together in order to ascertain legislative intent. (Citations omitted.)

Carver v. Carver, 310 N.C. 669, 674, 314 S.E. 2d 739, 742 (1984). The starting point in construing the statutes in the case *sub judice* is G.S. 8-50.1, which gives the trial judge the authority to order a blood test where the issue of parentage arises. The present action was commenced pursuant to Article 9, G.S. 110-128 *et seq.* which provide, *inter alia*, for Wake County to bring a civil action to determine paternity. G.S. 8-50.1 requires the party requesting the blood tests to be initially responsible for the costs; thereafter the statute provides that upon the entry of a verdict of parentage or non-parentage, the trial judge may tax the expenses for the blood tests and comparisons as costs in accordance with the provisions of G.S. 6-21. G.S. 8-50.1(b)(2).

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G.S. 6-21(10) allows the costs in a proceeding regarding illegitimate children under Article 3, Chapter 49 of the General Statutes to be taxed against either party, or apportioned among the parties, in the discretion of the court. The County commenced this civil action to determine the paternity of an illegitimate child, thus coming within the purview of Article 3, Chapter 49. Article 3, Chapter 49 is applicable to civil actions regarding illegitimate children. Construing the three statutes together, we conclude that it was within the discretion of the trial judge to tax the costs of the blood test to the defendant.

As to the remaining contentions, defendant has failed to argue or cite any authority in their support, therefore, the contentions are deemed abandoned. Rule 28(b)(5), Rules of Appellate Procedure.

Affirmed.

Judges WEBB and PHILLIPS concur.

SOUTHERN UTILITIES, INC. v. JERRY MANDEL MACHINERY CORPORATION

No. 8426DC166

(Filed 6 November 1984)

Uniform Commercial Code § 18— unspecified payment date—demand for payment by defendant—refusal by plaintiff—breach by plaintiff

In an action on a contract for the sale of goods in which plaintiff agreed to purchase machinery from defendant, paid a deposit and agreed to pay the balance before delivery with the payment and delivery date unspecified, plaintiff breached the contract by responding to defendant's request for payment with a refusal to pay and a demand for the return of the deposit. Defendant's letter was an offer to deliver rather than a breach, and plaintiff's reply was a repudiation of the contract. G.S. 25-2-301, 309, 703.

APPEAL by defendant from *Brown, Judge*. Judgment entered 22 August 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 October 1984.

Plaintiff sued for return of a deposit in the amount of \$4,000, paid toward the purchase price of a piece of machinery which had

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not been delivered. Defendant answered that plaintiff failed to pay the full purchase price and counterclaimed for lost profits and incidental damages in the amount of \$7,500. The trial court entered judgment for plaintiff in the amount of \$4,000. Defendant appeals.

Charles M. Welling for plaintiff appellee.

Erwin and Beddow, P.A., by Fenton T. Erwin, Jr., for defendant appellant.

WHICHARD, Judge.

After inspection of a piece of machinery at defendant's place of business, plaintiff and defendant entered into a contract whereby plaintiff agreed to purchase the machinery from defendant at a price of \$13,900. The invoice, dated 24 September 1979, states:

Price	13,900
Deposit Due	<u>4,000</u>
Balance Before Shipment	9,900

Plaintiff paid the deposit by a check dated within a few days of the invoice. The parties did not specify a time for payment of the balance and delivery.

In a letter dated 28 January 1980 defendant requested the balance of the payment due. Plaintiff replied, "We don't have sufficient spare capital to pay balance at present. If you don't want to hold until we do, please return deposit." On 6 February 1980 defendant, through counsel, again requested payment and plaintiff requested the return of its deposit.

Plaintiff contends that defendant breached the contract by demand for payment. Defendant contends plaintiff breached by refusing to pay and demanding return of its deposit. We find that plaintiff breached for the following reasons:

This case involves a contract for the sale of goods, governed by the Uniform Commercial Code (UCC), N.C.G.S. Ch. 25, Art. 2. Under the Code a contract for the sale of goods does not fail for indefiniteness merely because one or more terms are left open at the time of agreement. G.S. 25-2-204(3). The time for performance,

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if not otherwise agreed, is a reasonable time. G.S. 25-2-309(1). This Code provision accords with prior North Carolina common law. See *Colt v. Kimball*, 190 N.C. 169, 173-74, 129 S.E. 406, 409 (1925); *Ober v. Katzenstein*, 160 N.C. 439, 441, 76 S.E. 476, 477 (1912); *Hurlburt v. Simpson*, 25 N.C. 233, 236 (1842). The Code also specifies that a reasonable time for an action shall be determined by surrounding circumstances, G.S. 25-1-204(2), and provides guidelines for establishing the nature, purpose and circumstances of an agreement. G.S. 25-1-205.

Both parties agree that the governing code provision is § 25-2-309(1), which reads:

Absence of specific time provision . . . (1) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

This provision should be read in conjunction with the Official Comments appended to the section. Two of the comments are pertinent:

Subsection (1) requires that all actions taken under a sales contract must be taken within a reasonable time where no time has been agreed upon.

G.S. 25-2-309, Official Comment 1; and

When the time for delivery is left open, unreasonably early offers of or demand for delivery are intended to be read under this Article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side.

G.S. 25-2-309, Official Comment 4. While these comments are not entitled to as much weight as ordinary legislative history, White and Summers, *Uniform Commercial Code* 14 (1980), they are "by far the most useful aids to interpretation and construction," *id.* at 12, promoting reasonably uniform interpretation of the code by the courts. *Id.*

In this case defendant was aware that plaintiff could not pay the full price at time of contract. Plaintiff does not contend, and we would reject the contention, that any request for payment at

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any time by defendant was beyond the intention of the parties. Therefore, under the governing Code provision, plaintiff was to pay and defendant to deliver within a reasonable time.

Since plaintiff had agreed to pay in full prior to delivery, the request for payment is also an offer by defendant to deliver. Plaintiff testified, "I certainly knew that [defendant] would ship the piece of equipment once the price for it was paid. That was the original agreement." We therefore find that defendant's letters of 28 January and 6 February, requesting payment and impliedly offering delivery, were "expressions of desire or intention, requesting the assent or acquiescence of the other party," not amounting to breach. G.S. 25-2-309(1), Official Comment 4. This accords with commercial reasonability and with the plain language of defendant's 6 February letter to plaintiff, which reads: "I should appreciate your contacting the undersigned immediately for the purpose of *making arrangements* to have the above amount paid as soon as possible." (Emphasis supplied.)

The request for payment does not, without more, constitute a breach by defendant. *Id.* In plaintiff's testimony, however, plaintiff states, "We don't have the equipment; didn't want the equipment." The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract. G.S. 25-2-301. In this case it is the plaintiff buyer who was unwilling to accept and pay under the contract. Because plaintiff was short of cash, plaintiff repudiated the contract.

We find that plaintiff has breached its contract with defendant and that defendant is entitled to seller's remedies under G.S. 25-2-703. We note that these remedies are cumulative, are to be liberally administered, and depend entirely upon the facts of the individual case.

The judgment for plaintiff is reversed, and the cause is remanded for entry of an appropriate judgment in favor of defendant pursuant to G.S. 25-2-703.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

Cabarrus County v. City of Charlotte

CABARRUS COUNTY v. CITY OF CHARLOTTE

No. 8319SC1327

(Filed 6 November 1984)

**Counties § 2.1; Municipal Corporations §§ 4.1, 23.3— city landfill in another county
— fee schedule—county ordinance invalid**

The City of Charlotte acted within its power when it established and operated a sanitary landfill in Cabarrus County and imposed a schedule of fees to be paid by all users of the landfill. A Cabarrus County ordinance prohibiting the charging of fees to Cabarrus County residents and franchise haulers for the use of any sanitary landfill in Cabarrus County did not apply to the City of Charlotte since the City was not a licensee or franchisee of Cabarrus County; furthermore, the ordinance was improper because it based fees upon residence rather than kind and degree of service as required by G.S. 160A-314. G.S. 153-136(a)(1) and (4); G.S. 153A-152; G.S. 160A-312; G.S. 160A-314.

APPEAL by plaintiff from *Helms, Judge*. Judgment entered 30 September 1983 in Superior Court, CABARRUS County. Heard in the Court of Appeals 27 September 1984.

This is a civil action wherein plaintiff Cabarrus County filed a complaint and motion for preliminary injunction on 22 March 1983 seeking to prevent defendant City of Charlotte from charging fees to Cabarrus County residents and franchise haulers to use a landfill operated by defendant in Cabarrus County. On 29 April 1983 the court denied plaintiff's motion for preliminary injunction. On 30 September 1983 the court granted a motion made by defendant for summary judgment thereby dismissing the action. From the entry of summary judgment, plaintiff appealed.

Williams, Boger, Grady, Davis and Tuttle, by John R. Boger, Jr., for plaintiff appellant.

City of Charlotte, by Assistant City Attorney David M. Smith, for defendant appellee.

HILL, Judge.

Defendant and Charlotte Motor Speedway, Inc., entered into a contract dated 13 June 1977 which authorized defendant to operate a sanitary landfill on property owned by Charlotte Motor Speedway, Inc., in Cabarrus County. Defendant operated the landfill in Cabarrus County without charging fees to users until Feb-

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ruary 1983. In February 1983, defendant notified plaintiff that it would charge user fees at the landfill in Cabarrus County at the same rate as user fees charged at landfills operated in Mecklenburg County. The landfill fee schedule as set out in City of Charlotte Code Section 10-24 provides that fees would apply to all landfills operated by the City. Charlotte City Code Section 10-24(a)(1) provides that there will be no charge if the vehicle is loaded with household garbage or trash for any auto, van, half ton or less; pickup trucks, half ton or less; trailers, less than ten feet, single-axle, no dual wheels, but other vehicles must pay a fee according to the kind or size of vehicle entering the landfill to discharge solid waste.

In response on 7 March 1983 the Board of Commissioners of Cabarrus County amended Section X of the Cabarrus County Solid Waste Ordinance, effective upon adoption to provide:

No fees may be charged residents of Cabarrus County or franchise haulers by the owners or operators, or either of them, of any sanitary landfill located within Cabarrus County.

Despite plaintiff's amended ordinance, defendant continued to enforce its landfill fee schedule and required Cabarrus County residents and franchisees to pay for using the landfill.

Plaintiff assigns as error the court's granting of summary judgment for defendant. They argue that though there is no controversy as to the facts in the case, the law does not support the court's judgment. Defendant asserts that summary judgment was proper because the City has the power to operate a public enterprise located in Cabarrus County and to regulate the fees charged to all users, free from any overriding power of the County to regulate fees.

G.S. 1A-1, Rule 56(c) permits the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." We find that the court properly granted summary judgment to the defendant.

Cities derive their corporate powers from the State, *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E. 2d 231 (1975), and

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possess and can exercise only such power as is conferred upon them by the State and no other. *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697 (1965). G.S. § 160A-312 grants cities the specific power to establish and operate a public enterprise, such as a landfill for the disposal of solid waste, even if that public enterprise is outside the city's corporate limits. A city has full authority to establish rules and regulations for any public enterprise it operates. The State has granted cities authority to fix and enforce rates in keeping with the standards established in G.S. § 160A-314. Therefore, it is clear that the City of Charlotte acted within its power when it established and operated the landfill in Cabarrus County and imposed a schedule of fees to be paid by all users.

The question remains whether plaintiff had an overriding power to enforce its amended solid waste ordinance on the landfill operated by the City of Charlotte because that landfill was located within the boundaries of Cabarrus County. As with cities, the State grants power to counties to legislate. The State has empowered counties to regulate the disposition of solid wastes within its boundaries. G.S. § 153A-136(a). A county may set standards for solid waste disposition by "regulat[ing] the activities of persons, firms and corporations, both public and private." G.S. § 153A-136(a)(1). But a county may regulate only those fees that are charged by licensees or franchisees. G.S. § 153A-136(a)(4). One becomes a licensee through the payment of a privilege license tax. A county may levy privilege license taxes only to the extent authorized in N.C. Gen. Stat. Chapters 105 and 153A. G.S. § 153A-152. N.C. Gen. Stat. Chapters 105 and 153A do not authorize a county to charge a license privilege tax to a public enterprise of a municipality. In the absence of a specific grant of power allowing a county to license the public enterprise of a municipality, a county would be unable to require a city to become a licensee. Here it is clear the City of Charlotte is neither a licensee, nor could it be compelled to become a licensee, nor is it a franchisee of plaintiff. Therefore, the plaintiff is without power to impose its own fee schedule on defendant for the landfill located in Cabarrus County.

Further, any powers which a county possesses must be exercised in conformity with the laws of the State. G.S. § 153A-11. Local ordinances cannot override statutes applicable to the entire

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State. *Staley v. Winston-Salem*, 258 N.C. 244, 128 S.E. 2d 604 (1962). The ordinance as enacted by the plaintiff would if imposed upon the City, violate the directive of the General Statutes that requires cities to schedule fees according to classes of service. G.S. § 160A-314(a). It is a fundamental principle that a public utility, whether publicly or privately owned, may not discriminate in the distribution of services or the establishment of rates. *Dale v. Morganton*, 270 N.C. 567, 155 S.E. 2d 136 (1967). There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953). Here the ordinance enacted by Cabarrus County would require the City of Charlotte to charge rates based upon residence rather than kind and degree of service as required by G.S. § 160A-314. Therefore, the ordinance as written was improper because it based fees upon the wrong criteria in contravention of G.S. § 160A-314.

Finally, defendant argues that the 7 March 1983 ordinance violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and the "law of the land" clause in Article I, Section 19 of the Constitution of North Carolina. We need not address this contention because we have established that there are sound statutory grounds to decide whether or not the County could enforce its ordinance against the City.

We hold summary judgment for defendant was appropriate. The judgment of the trial court is affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

Parrish v. Burlington Industries, Inc.

HAZEL C. PARRISH v. BURLINGTON INDUSTRIES, INC. AND AMERICAN
MOTORISTS INSURANCE COMPANY

No. 8410IC112

(Filed 6 November 1984)

1. Master and Servant § 69— measure of damages—work-related portion of partial impairment—correct multiplier

Where the Industrial Commission found that plaintiff had a 40% impairment of her lungs, that she was "permanently disabled in like degree," and that 30% of her 40% partial disability was work-related, the correct measure of damages under G.S. 97-30 would be 86⅔% of her average weekly wage multiplied by 30%.

2. Master and Servant § 69.1— degree of respiratory impairment—distinguished from degree of disability—measure of damages

The Industrial Commission should not have found that plaintiff was disabled in the same degree as her lung impairment, based on AMA classifications, where plaintiff's respiratory impairment was found to be 40% and the AMA guidelines showed 50% to 70% as the most severe class of respiratory disease, totally disabling a person for most types of employment. The loss of respiratory capacity in a living claimant cannot be total, and the percent of impairment is not necessarily identical to the percent of disability. G.S. 97-30.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 19 August 1983. Heard in the Court of Appeals 24 October 1984.

Plaintiff filed a claim for workers' compensation for disability caused by occupational lung disease. The Deputy Commissioner found plaintiff 30% physically impaired and awarded her \$9.06 per week for 300 weeks. The Full Commission found plaintiff 40% physically impaired, 30% of which is work-related, and awarded her \$14.50 per week for the same period. From this award plaintiff appeals.

Frederick R. Stánn for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., and William L. Young, for defendant appellees.

WHICHARD, Judge.

Plaintiff argues that the Commission erred by failing correctly to determine the amount of compensation to which she was en-

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titled under G.S. 97-30. We agree, and we accordingly vacate and remand for entry of a new award.

[1] The Commission found that plaintiff has a 40% physical impairment of her lungs. The medical evidence supports the finding; it is therefore conclusive on appeal. *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 586, 281 S.E. 2d 463, 465 (1981). The Commission further found that plaintiff "is thereby permanently partially disabled in like degree," and that 30% of her 40% permanent partial disability is work-related. Plaintiff thus impliedly meets the threshold requirement for occupational disease in that her occupation "significantly contributed to, or was a significant causal factor in" her lung impairment. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E. 2d 359, 369-70 (1983). Neither party contends that the *Rutledge* requirement is not met. The Commission concluded from its findings that plaintiff is entitled to compensation at the rate of \$14.50 per week for 300 weeks.

The appropriate award under the above findings is determined by G.S. 97-30, which governs partial incapacity. The applicable language reads:

. . . where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury.

G.S. 97-30 (1983). In interpreting this language our Supreme Court has stated that "the Worker's Compensation Act . . . requires compensation only for that portion of [a] disability caused, accelerated or aggravated by the occupational disease." *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E. 2d 458, 470 (1981). In *Morrison*, while plaintiff was totally disabled, only 55% of that disability resulted from occupational disease. "Hence," the court stated, "[claimant is] entitled to compensation for partial disability, not total disability, because the occupational disease caused

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only part of the disability. Therefore G.S. 97-30, not G.S. 97-29 [which provides compensation rates for total incapacity] governs. . . ." *Id.* at 11, 282 S.E. 2d at 465.

The Commission found, without exception, that plaintiff's average weekly wage during her last year with defendant-employer was \$181.28, and that plaintiff has not worked since she left defendant-employer. Defendants do not dispute that \$181.28 is thus the appropriate initial multiplier. The second multiplier in the statutory formula is 66⅔%; the result obtained by multiplying \$181.28 by 66⅔% is \$120.85.

It appears that from this point the Commission determined its award by first multiplying the figure thus obtained (\$120.85) by the partial impairment found (40%) and further multiplying the result of that calculation by the work-related portion of the impairment (30%) ($\$120.85 \times .40 = 48.34 \times .30 = \14.50). The double multiplier used at this stage of the calculation significantly over-reduced the award. The findings establish that 30% of plaintiff's impairment is work-related. She is entitled under these findings to be compensated in an amount equal to that percentage of the \$120.85 figure. 30% thus should have been the sole multiplier applied to the \$120.85 figure. Assuming, without deciding, that the above findings are correct, the appropriate award thus is \$36.25 per week ($\$120.85 \times .30 = \36.25).

[2] We note further, however, the following: The Commission found as a fact that plaintiff is permanently partially disabled in the same degree as her physical impairment. The opinion and award recites parenthetically that the Commission used "AMA classifications" in reaching its findings. The reference apparently is to American Medical Association, *Guides to the Evaluation of Permanent Impairment* 67-77 (1977). The guidelines in that publication establish 50%-70% impairment as the most severe class of respiratory disease. *Id.* at 75-76. The publication's description of the symptoms indicates that a person in this classification would be totally disabled for most types of employment. *Id.* Obviously, the loss of respiratory capacity in a living compensation claimant cannot be total—as can, for instance, the loss of sight or mobility—because some percentage of respiratory capacity is essential to sustain life.

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It thus would seem that the percentage of impairment and the percentage of disability are not necessarily identical, indeed, that for claimants in the highest classification they are unlikely to be so. In applying G.S. 97-30 as interpreted in *Morrison*, 304 N.C. 1, 282 S.E. 2d 458, the Commission must ascertain the percentage of a claimant's inability to work that is caused by occupational disease, not merely the percentage of impairment so caused.

This case differs from *Morrison* in that *Morrison* did not address the percentage of lung impairment suffered by the claimant; the evidence was solely as to the "percentage . . . of [claimant's] disablement, that is, incapacity to earn wages" that resulted from an occupational disease. *Id.* at 7 n. 2, 282 S.E. 2d at 463 n. 2. The plaintiff in *Morrison* may have been 100% disabled for work but her lungs could not have been 100% impaired. Under the AMA guidelines, for example, it appears that a claimant with 50% lung impairment may be 100% disabled for work. If so, a claimant, like plaintiff here, with 40% lung impairment, 30% of which is work-related, would be 60% disabled for work on account of work-related causes. The proper formula for compensation under G.S. 97-30 in such case would be the difference between wages before and after the disease (181.28) multiplied by 66 $\frac{2}{3}$ % multiplied by 60% rather than by 30% ($\$181.28 \times 66\frac{2}{3}\% = \$120.85 \times .60 = \$72.51$).

The award is in any event improperly calculated under the findings made. It thus must be vacated and the cause remanded for entry of a properly calculated award. Upon remand the Commission should consider, in light of the foregoing, the propriety of its finding that plaintiff's physical impairment and disability are "in like degree." It may receive additional evidence for that purpose and enter new findings and conclusions as appropriate.

Vacated and remanded.

Judges JOHNSON and PHILLIPS concur.

Miller v. Davis

R. MICHAEL MILLER AND SHELBY FAMILY PRACTICE, P.A. v. MAXINE C. DAVIS, EXECUTRIX U/W DEARCY HERBERT DAVIS, AND SEABOARD COAST LINE RAILROAD COMPANY

No. 8427SC72

(Filed 6 November 1984)

Railroads § 5.8— grade crossing accident—obstructed view—motorist not negligent as matter of law

In an action for negligence arising from a collision between a car driven by plaintiff and a train operated by defendant, summary judgment should not have been entered for defendant where the evidence showed that plaintiff looked to the east as he approached the crossing, had his view blocked by a shed, looked to the west until he could see past an obstruction in that direction, looked back to the east, and found himself virtually in the crossing and unable to avoid the collision. Although plaintiff had a clear view to the east about 15 feet before the track, it is not contributory negligence as a matter of law for a driver to fail to observe a train approaching from one direction while he continues looking in another direction until he can see around an obstruction.

APPEAL by plaintiffs from *Snepp, Judge*. Judgment entered 26 September 1983 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 23 October 1984.

The plaintiffs brought this action for personal injury and property damage arising from a collision between a motor vehicle driven by Dr. Miller and a train being operated by Dearcy Herbert Davis, an engineer for Seaboard Coast Line. The plaintiffs alleged the negligence of Seaboard's agent Dearcy Herbert Davis was a proximate cause of the injury and damage. The defendants filed an answer in which they denied any negligence and pled the contributory negligence of Dr. Miller as a bar to recovery by the plaintiffs.

The defendants made a motion for summary judgment. The papers filed in support and opposition to the motion showed that on 7 October 1979 at approximately 9:40 a.m. R. Michael Miller was operating an automobile owned by Shelby Family Practice, P.A. in a southerly direction on North Washington Street in Shelby, North Carolina. He was approaching a crossing of the Seaboard Coast Line. At this time Mr. Davis was operating a freight train of Seaboard in a westerly direction on the track east of the crossing. At the crossing there was a main line track and a

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side track on each side. The approaching train was on the main line.

Dr. Miller testified by deposition that he had crossed the railroad on North Washington Street many times and was familiar with the crossing. He looked to his left when he was 150 to 200 yards from the crossing and saw some stationary cars on one of the tracks. As he proceeded toward the crossing the cars were blocked from his view by a shed on the railroad right of way. He then looked to his right to see if a train was coming from the west. There was a "boulder structure" to his right "fifty to seventy-five yards from the center of the intersection." He continued to look toward the west toward the obstruction in that direction until he could see that the track was clear from the west. When he saw that the track was clear to the west he looked back to the east. At that time he was "virtually in the crossing" and was unable to stop his vehicle in time to avoid the collision. He was proceeding at approximately fifteen miles per hour immediately before he reached the track. The shed to Dr. Miller's left was in such a position that fifteen feet before he reached the track he could have seen up the track for a distance of several hundred feet if he had looked. The Court granted the defendants' motion for summary judgment. Plaintiffs appealed.

N. Dixon Lackey for plaintiffs appellants.

John M. Burtis and Thomas D. Garlitz for defendants appellees.

WEBB, Judge.

The holding of *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979), is that if the defendant in a negligence action makes a motion for summary judgment and supports it by papers which forecast evidence which would entitle him to a directed verdict if offered at trial, the Court must grant the motion for summary judgment unless the plaintiff offers a forecast of evidence which would be sufficient to require the denial of a motion for directed verdict if the evidence were introduced at trial. If the forecast of evidence in this case is such that if the evidence were offered at trial the defendants would be entitled to a directed verdict in their favor the judgment of the superior court must be affirmed.

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There was sufficient evidence forecast in this case for a jury to find that the defendants were negligent. The question is whether the evidence is such that the only reasonable inference a jury could make from the evidence is that Dr. Miller was contributorily negligent. There have been many cases dealing with the contributory negligence of a motor vehicle operator at a railroad crossing. See *Cox v. Gallamore*, 267 N.C. 537, 148 S.E. 2d 616 (1966); *Ramey v. R.R.*, 262 N.C. 230, 136 S.E. 2d 638 (1964); *Carter v. R.R.*, 256 N.C. 545, 124 S.E. 2d 561 (1962); *Arvin v. McClintock*, 253 N.C. 679, 118 S.E. 2d 129 (1961); *Faircloth v. R.R.*, 247 N.C. 190, 100 S.E. 2d 328 (1957); *Irby v. R.R.*, 246 N.C. 384, 98 S.E. 2d 349 (1957); *Dowdy v. R.R.*, 237 N.C. 519, 75 S.E. 2d 639 (1953); *Jones v. R.R.*, 235 N.C. 640, 70 S.E. 2d 669 (1952); *Parker v. R.R.*, 232 N.C. 472, 61 S.E. 2d 370 (1950) and *Jeffries v. Powell*, 221 N.C. 415, 20 S.E. 2d 561 (1942). We believe the general rule from these cases is that a motorist is contributorily negligent in approaching a railroad track if he does not see what he could have seen even if he had to come to a stop to do so. In *Mansfield v. Anderson*, 299 N.C. 662, 264 S.E. 2d 51 (1980); *Neal v. Booth*, 287 N.C. 237, 214 S.E. 2d 36 (1975); and *Johnson v. R.R.*, 257 N.C. 712, 127 S.E. 2d 521 (1962) our Supreme Court held the plaintiffs were not barred by this rule. In *Mansfield* the evidence most favorable to the plaintiffs was that the driver had to be within one foot of the track to have an unobstructed view so that he could see a sufficient distance up the track to see the approaching train. In *Neal* the driver had to be on a side track and within twenty-one feet of the main track upon which the train was approaching before he had an unobstructed view. In *Johnson* the driver could have stopped just short of the track and gained a clear view of the approaching train. The Supreme Court held the driver was not contributorily negligent as a matter of law because there was an obstruction barring the driver's view until he was just short of the track and the warning light was not operating.

We believe we are bound by *Baker v. R.R.*, 202 N.C. 478, 163 S.E. 452 (1932) to hold it was error to allow the defendants' motion for summary judgment. In that case, as the driver approached the track he had an unobstructed view to his right 67 feet from the track. There was an obstruction to his left which prevented a view of the track until he was "nearly on the track." He first looked to his right and then looked to his left until he

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reached the track at which time a train approaching from the right struck him. Our Supreme Court held the question of contributory negligence was for the jury. The Court said, "[It] cannot be said that plaintiff is barred of recovery as a matter of law because he gave more attention to the direction where the probability of danger was greatest." We believe *Baker* holds that if there is an obstruction on one side of the track at which the driver looks until he can see around the obstruction it is not contributory negligence as a matter of law for him not to observe a train approaching from the opposite direction while he is so looking. We believe that *Baker* like *Mansfield*, *Neal* and *Johnson*, is an exception to the general rule. We hold that this case fits that exception.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. HANSEL ROTEN

No. 8423SC142

(Filed 6 November 1984)

1. Searches and Seizures § 43— seized evidence—absence of pretrial motion to suppress—waiver of right to contest admissibility

By failing to make a motion to suppress seized evidence before trial, defendant waived his right to contest the admissibility of the evidence at trial on constitutional grounds.

2. Narcotics § 4.3— constructive possession of growing marijuana plants

The State's evidence was sufficient to support an inference that defendant had constructive possession of marijuana plants so as to support his conviction of felonious possession thereof where it tended to show that a pipe connected to the water supply in defendant's house was being used to irrigate 171 marijuana plants growing in various plots approximately 282 feet from defendant's house, that the path running through a wooded area to the plots of marijuana plants followed the placement of the pipe and was the only readily accessible means of ingress to and egress from the plots, and that the plants weighed 80 pounds.

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APPEAL by defendants from *Freeman, Judge*. Judgment entered 9 November 1983 in Superior Court, WILKES County. Heard in the Court of Appeals 16 October 1984.

Defendant was charged in a proper bill of indictment with felonious trafficking in marijuana in violation of N.C. Gen. Stat. Sec. 90-95(h). He was found guilty of felonious possession of marijuana. From judgment entered on the verdict sentencing him to a prison term of two years, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney William N. Farrell, for the State.

Franklin Smith for defendant, appellant.

HEDRICK, Judge.

[1] Defendant's first assignment of error relates to the admission of evidence at trial over defendant's objections. Defendant argues that the witness for the State should not have been allowed to testify "to the illegal search and seizure of the defendant's home and surrounding premises."

N.C. Gen. Stat. Sec. 15A-975 provides that a motion to suppress evidence in superior court must be made prior to trial, subject to several enumerated exceptions. "When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds." *State v. Detter*, 298 N.C. 604, 616, 260 S.E. 2d 567, 577 (1979). Defendant does not contend that any of the statutory exceptions apply under the circumstances of the instant case, nor does our examination of the record reveal any support for such a contention. We thus hold defendant waived his right to contest at trial the admissibility of the challenged testimony on constitutional grounds. The assignment of error is overruled.

[2] Defendant next contends the trial court erred in denying his motions to dismiss the charge against him. Considered in the light most favorable to the State, the evidence tends to show the following:

Defendant, his wife, and his son live in the second story of a two-story house in a rural area in Wilkes County. Defendant rents

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the first floor to nine young men who are members of a band. On 16 August 1983 officers from the Wilkes County Sheriff's Department went to the defendant's residence with a search warrant. After a search of the house yielded only a picture of a marijuana plant, found in the first story, the officers went outside the residence, where they found a "black plastic-type pipe" connected to the water system in the basement of the house. The officers followed the pipe "across a small pasture area into a wooded area" where it was connected to a green "water-type" hose and where, 282 feet from the house, they found a plot of approximately thirty marijuana plants. The pipe branched off in a "joint or T section," with other pipes or hose in this wooded area, and these led to other plots of marijuana. The pipes were located next to "well worn paths" which ran through the area, and the pipe came to an end just before the path ended. Officers seized 171 plants, ranging in size from six inches to seven feet. The officers searched for "a shorter way" than that offered by the path near defendant's house into the heavily wooded thicket in which the plants were found, but were unable to find any other route by which they might more easily remove the harvested plants. The plants were found to weigh eighty pounds.

N.C. Gen. Stat. Sec. 90-95 defines felonious possession of marijuana as possession of more than one ounce of marijuana. Defendant's contention on appeal is that the State failed to offer evidence tending to show that he possessed the marijuana found near his home, and the charge against him should thus have been dismissed.

Possession of narcotics may be actual or constructive. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983). "Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance." *Id.* at 455, 298 S.E. 2d at 374.

In the instant case, the evidence tends to show that the pipe running between defendant's house and the plots of marijuana plants was readily visible and was connected, in the basement of defendant's house, to defendant's water supply. Further, the path running through the wooded area to the various plots of marijuana plants followed the placement of the pipe, and was the only readily accessible means of ingress and egress to the plots. There

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was ample evidence tending to show that the pipe, connected to defendant's water supply in defendant's house, was being used to irrigate marijuana plants growing 282 feet from defendant's residence. This evidence taken in the light most favorable to the State is more than sufficient to raise an inference that defendant had both the intent and the capability to exercise control over the plants. The court thus acted properly in denying defendant's motion to dismiss.

No error.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. HARVEY SNIPES

No. 848SC155

(Filed 6 November 1984)

Larceny § 7.3— ownership of property stolen—question for the jury

In a prosecution for felonious larceny of a horse in which defendant admitted taking the horse, there was at least an issue for the jury as to ownership of the property and a corresponding right to possession where defendant had sold the horse in a defeasible sale, the condition to the sale never transpired, defendant demanded return of the horse from the original and subsequent vendee, and defendant never received payment in full for the horse but advised the original purchaser to retrieve his first payment.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 10 September 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 16 October 1984.

Defendant was convicted of the misdemeanor of larceny of a horse or gelding and gave notice of appeal. He did not perfect his appeal, and this court has allowed certiorari to consider his appeal.

Attorney General Rufus L. Edmisten by Associate Attorney General Sueanna P. Peeler for the State.

Braswell, Taylor and Brantley, by Roland C. Braswell for defendant appellant.

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HILL, Judge.

The State presented evidence that in 1978 defendant owned a Tennessee Walking Horse. Defendant made an oral contract with William Conley to sell him the horse for \$500.00, the purchase price to be paid \$100.00 down and the balance over a period of time. Defendant testified that the sale was conditional upon his daughter's consent to the sale. Two or three days later defendant advised Conley that his daughter did not wish to sell the horse and for Conley to come by his office and pick up his check. Conley did not come by for his check and it was still in defendant's possession at the time of trial.

At trial, defendant testified that the horse disappeared from his property some time after his conversation with Conley, and that he advised Conley and Conley's brother-in-law, Newsome, that he wanted the horse back. Defendant also attempted to remove the horse from the property of one David Lane, but was not allowed to do so.

Newsome testified that he purchased the horse from Conley and kept the horse on his property. He was aware the defendant wanted the horse back. On 17 January 1981, he observed defendant load the horse in his trailer and carry it away without his permission. Thereafter Newsome swore out the warrant charging defendant with felonious larceny. Defendant admitted taking the horse.

At the close of the evidence defendant moved to dismiss this matter, which motion was denied. The matter was submitted to the jury, which found defendant guilty of misdemeanor larceny.

Defendant brings forth several assignments of error, but we consider one assignment to be dispositive: Did the trial court err in refusing to permit defendant's counsel to argue to the jury that if the jury found that defendant owned the horse or had a bona fide claim of ownership to the horse and took it acting as a result of his ownership or bona fide claim of ownership, he did not have the felonious intent to take property of another? Defendant asserts that all the evidence considered in the light most favorable to the State showed that the defendant at all times either thought he was the owner or had a bona fide claim of ownership to the horse and that with such ownership, or bona fide claim of ownership, he could not be guilty of larceny.

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To establish the offense of felonious larceny, the State was required to prove that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982); *State v. Booker*, 250 N.C. 272, 108 S.E. 2d 426 (1959). The case of *State v. Thompson*, 95 N.C. 596 (1886), alludes to the specific intent element of the crime of larceny. In that case the defendant purchased a horse, but title was not to pass until the price was paid. With failure of payment, the vendor recovered possession, and thereupon the defendant in the night secretly took the horse from the vendor's stable and carried it away in a manner indicating a felonious intent. The court concluded that a charge to the jury that the defendant would be guilty of larceny if the taking was *not* under a bona fide belief that he owned the property, or an interest in the horse, was not erroneous.

In the case under review, there is evidence that the sale was defeasible, conditioned upon defendant's daughter agreeing to the sale, an agreement which never transpired. There is evidence that demand was made by defendant for return of the horse both to the original and subsequent vendee. There is further evidence that defendant never received payment in full for the horse, but advised the original purchaser to retrieve his first payment. This evidence is undisputed. Without question, there is at least an issue for the jury as to ownership of the property and a corresponding right to possession. Newsome could take no better title than Conley and had no better right to possession.

The judgment in the cause is vacated and the case remanded to the trial court for a new trial in accordance with this opinion.

New trial.

Judges ARNOLD and WELLS concur.

International Minerals v. Matthews

INTERNATIONAL MINERALS AND CHEMICAL CORPORATION v. JANET J. MATTHEWS

No. 8311SC1166

(Filed 6 November 1984)

1. Uniform Commercial Code § 32— negotiable instrument— antecedent obligation— no necessity for consideration— applicability to accommodation maker

The statute providing that no consideration is necessary for a negotiable instrument given in payment of or as security for an antecedent obligation, G.S. 25-3-408, applies to both obligors and accommodation makers.

2. Uniform Commercial Code § 28— negotiable instrument— unconditional promise to pay— reference to deeds of trust and security agreement

The incorporation of two deeds of trust and a security agreement into a note by reference did not make the promise to pay uncertain or conditional so as to impair the negotiability of the note. G.S. 25-3-104(1)(b).

APPEAL by defendant from *Bailey, Judge*. Order entered 24 August 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 18 September 1984.

By a verified complaint plaintiff sued defendant for \$155,737.20, together with interest and attorney's fees, allegedly due under the terms of a note dated August 28, 1980. A copy of the note, attached as an exhibit to the complaint, showed that it was in the principal sum of \$188,850.04, was payable upon demand, and was executed by defendant, her husband, and Benson Agri Supply, Inc. The note also contained the following statement: "This note is given to secure the account of Benson Agri Supply, Inc., and is secured by a security agreement and deed of trust on the corporate maker's property and deed of trust on individual maker's real estate which is a lien upon the property therein described. The provisions of all security instruments securing this note are incorporated herein by reference." In an unverified answer, defendant admitted that she executed the note and had refused to pay the sum demanded, but she denied the debt, asserting as an affirmative defense that the note was without consideration in that it was given to secure a pre-existing debt. Contending that no genuine issue of fact is involved in the case, plaintiff moved for summary judgment under the authority of Rule 56, N.C. Rules of Civil Procedure. Plaintiff's motion was supported by the affidavit of its account executive to the effect that

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defendant executed the note to secure a debt that Benson Agri Supply, Inc. already owed plaintiff. Defendant filed no response or counter-affidavit. The trial judge granted the motion and entered an order establishing defendant's indebtedness to plaintiff in the amount of principal, interest and attorney's fees stated in the complaint and note.

Pope, Tilghman and Tart, by Patrick H. Pope and Ann C. Taylor, and Lytch, Rizzo & Thompson, by Benjamin N. Thompson, for plaintiff appellee.

Clifton & Singer, by Benjamin F. Clifton, Jr. and W. Robert Denning, III, for defendant appellant.

PHILLIPS, Judge.

[1] If the note involved in this case is a negotiable instrument, governed by the Uniform Commercial Code, the order of summary judgment was correctly entered and the defendant's appeal is without merit. This is because execution, demand and nonpayment are admitted and the only defense raised, that the note was for a pre-existing debt and without consideration, has been rendered nugatory by G.S. 25-3-408. This statute, in pertinent part, provides as follows:

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (§ 25-3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.

Defendant contends that this statutory provision does not apply to this case, because she did not owe the pre-existing debt, Benson Agri Supply did, and signed the note only as an accommodation. But the statute contains no such exception, and we see no basis for inserting one by interpretation. The statute is not ambiguous. Even though accommodation makers and obligors alike in great numbers sign instruments given in payment of or as security for antecedent obligations of various kinds, the statute states without limitation or reservation that consideration is not required for such instruments. It seems obvious to us, therefore, and we so hold, that both the intent and effect of this enactment was to deprive all signers of such instruments of the common law

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defense of no consideration that defendant now relies upon. Nevertheless, defendant's position is not entirely without judicial support. In *Capital City Bank v. Baker*, 59 Tenn. Ct. App. 477, 442 S.W. 2d 259 (1969), which involved circumstances similar to those recorded here, the Tennessee Court of Appeals held that that state's identical enactment applies only to obligors and that the accommodation co-maker's plea of no consideration was sound. But, so far as our research discloses, all other courts that have considered this question have construed the provision as we do; decisions so holding include *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W. 2d 697 (1981); *First National Bank of Elgin v. Achilli*, 14 Ill. App. 3d 1, 301 N.E. 2d 739 (1973); *Musulín v. Woodtek, Inc.*, 260 Or. 576, 491 P. 2d 1173 (1971); and the several others cited therein.

[2] The defendant further contends, however, that the note involved is not governed by the Uniform Commercial Code because it is not a negotiable instrument within the terms of G.S. 25-3-104. In pertinent part, this statute provides:

(1) Any writing to be a negotiable instrument within this article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or bearer.

As a writing signed by the several makers that is payable to the holder on demand, the note clearly meets the requirements of subparagraphs (a), (c) and (d) above, and defendant does not contend otherwise. Defendant does contend, however, that the note does not contain the unconditional promise to pay required by subparagraph (b) because of the two deeds of trust and security agreement that are incorporated into the note by reference. Certainly, as defendant argues and the statute provides, a promise is not unconditional if the instrument containing it states that it is *subject to* or *governed by* any other agreement or writing. G.S.

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25-3-105(2)(a). But referring to a mortgage or other collateral does not impair negotiability. G.S. 25-3-105(1)(e); G.S. 25-3-112(1)(b). Nor, in our opinion, does incorporating into a note the liens that secure its payment, as was done here. The deeds of trust and security agreement given to secure the debt or promise to pay could not have rendered defendant's promise to pay uncertain or conditional. The decision most relied upon by defendant, *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978), is not in point. In that case the note lost its negotiability because the instruments incorporated into it were a deed of separation and property settlement agreement, which from their nature could contain offsetting obligations that would eliminate or reduce the obligation to pay the note as promised. But mere liens securing payment of a debt cannot affect the obligation to pay it.

Affirmed.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. WILLIAM CONNIE SLADE

No. 8415SC201

(Filed 6 November 1984)

Criminal Law § 85— evidence of defendant's bad reputation—State's cross-examination of defense witness—improper

In a prosecution for second degree murder, the trial court erred by admitting evidence that defendant had a reputation for shooting people elicited by the State on cross-examination of a defense witness when defendant had neither testified nor offered evidence of his good character.

APPEAL by defendant from *Preston, Judge*. Judgment entered 27 April 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 18 October 1984.

Defendant was charged in a true bill of indictment with second degree murder. From the jury's verdict of guilty of voluntary manslaughter, defendant appeals.

Attorney General Rufus L. Edmisten, by Associate Attorney General David R. Minges for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen for defendant appellant.

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HILL, Judge.

The facts necessary for a resolution of the issues on appeal are briefly stated as follows: On 1 March 1983, Willie Patrick arrived at Mildred Warren's house with a fifth of vodka. Shortly thereafter an argument ensued between Willie Patrick and defendant. Defendant pulled a pistol out of his pocket and fired a shot over Willie Patrick's head. The argument continued and approximately five minutes later defendant shot and killed Willie Patrick. Defendant offered evidence tending to show self-defense.

Defendant first asserts that the trial court erred by admitting evidence tending to show the general reputation of defendant to shoot people when defendant had offered no evidence of good character. The following colloquy on cross-examination between the prosecutor and a witness for defendant elicited the reputation evidence in question:

Q. You've been knowing Connie for about how long?

A. Five years.

Q. You're familiar with his reputation, aren't you?

A. Yes.

Q. What is his reputation?

MR. SMITH: Objection.

COURT: Overruled. You may answer it.

Q. What is his reputation?

COURT: What it would be . . .

A. What you mean by reputation?

Q. What do you know about Connie Slade in the community?

A. I know—well, everybody know Connie'll shoot you, true, yeah.

Q. Do what?

A. I said yes, people know he'll shoot you, yeah.

Q. You've got to talk slower . . . and explain to the jury what you're saying.

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A. I said, "Yes, people know Connie'll shoot you, yeah."

Q. People know Connie will shoot you?

A. Yeah.

Q. Is that what you're saying?

A. Yeah.

When a criminal defendant offers testimony concerning his good character, the State is free to offer evidence of his bad character in rebuttal. *State v. Nance*, 195 N.C. 47, 141 S.E. 468 (1928). However, until such evidence is offered, the State may not offer evidence of defendant's bad character. *State v. Tessnear*, 265 N.C. 319, 144 S.E. 2d 43 (1965); *State v. Rinaldi*, 264 N.C. 701, 142 S.E. 2d 604 (1965). Since defendant had not testified as a witness nor offered evidence of his good character, the State was precluded from showing his bad character for any purpose whatsoever. See *State v. Tessnear*, *supra*; see also *State v. Nance*, *supra*.

Under the circumstances here, the admission of evidence tending to show the general reputation of defendant to shoot people was prejudicial error. Defendant's theory at trial of entitlement to use force to repel the threatened assault by Willie Patrick placed the question of reasonable force under the circumstances before the jury. In addition, defendant should not be placed in a situation in which he feels compelled to testify in order to rebut the prosecution's premature reputation evidence. Evidence as to defendant's bad reputation was inadmissible and prejudicial, warranting a new trial.

In view of our decision that defendant is entitled to a new trial, it is neither necessary nor advisable to discuss defendant's other assignments of error. The asserted errors may not arise in the next trial.

New trial.

Judges ARNOLD and WELLS concur.

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WILLIAMS AND MICHAEL, P.A. v. ISABELLE CLANTON KENNAMER

No. 8326DC1259

(Filed 6 November 1984)

1. Attorneys at Law § 6— withdrawal of attorney—notice to client

An attorney of record may not be permitted to withdraw on the day of trial without first satisfying the court that he has given his client *prior* notice which is both specific and reasonable. Where the attorney has given his client no prior notice of an intent to withdraw, the court must grant the client a reasonable continuance or deny the attorney's motion to withdraw.

2. Attorneys at Law § 6— withdrawal of attorney—absence of notice to client—prejudice

Defendant was prejudiced when the trial court permitted her counsel to withdraw on the trial date without prior notice to her and set the trial for only two days later and is entitled to a new trial where defendant, an elderly woman in poor health, represented herself at trial and had difficulty speaking and following the court's instructions.

APPEAL by defendant from *Brown, Judge*. Judgment entered 20 June 1983 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 September 1984.

Plaintiff law firm sued defendant on breach of contract for monies owed for services rendered. The trial court, sitting without a jury, entered a verdict in favor of plaintiff.

The facts of the case are as follows: On 15 May 1981, plaintiff filed a complaint in District Court alleging defendant's failure to pay \$1,306.05 worth of legal services rendered pursuant to an oral contract entered into in February 1977. Defendant, through her counsel, Sol Levine (Levine), filed an answer denying plaintiff's charges. Defendant also requested in her answer that "[a]ll issues of fact be tried by a jury." On 16 September 1982, Levine requested and was granted a motion for continuance based on defendant's poor health. Trial was ultimately calendared for the week of 13 June 1983. Neither defendant nor Levine appeared at calendar call and Monday, 13 June 1983 was established as the trial date. On that day, the court refused to grant an additional motion for continuance by defendant through Levine. Levine thereafter petitioned the trial court to allow him "to withdraw as attorney of record in this case and [to allow] defendant a reasonable period of time to secure new counsel." Levine asserted that defendant had

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failed to heed his advice on this matter for a period of two years and that he could no longer "objectiv[ely]" represent defendant. The trial court granted Levine's motion to withdraw and set trial for 15 June 1983, two days later. Defendant was not present in court and had been given no prior notice of Levine's intent to withdraw.

As of 2:00 p.m. on 15 June 1983, the trial court received no contact from defendant nor from any other attorneys on defendant's behalf. The court had been advised by Levine that defendant was given notice of his withdrawal on 13 June and that he further advised her to retain new counsel if she desired representation for the 15 June trial. The trial court noted defendant's absence in the record and proceeded with the trial. Finally, at 2:43 p.m., after plaintiff's opening statement and the swearing in of plaintiff's first witness, defendant appeared and attempted to represent herself. She stated that she had not received notice of the 15 June trial date or of Levine's withdrawal until 14 June.

After trial, the Court awarded plaintiff a verdict in the amount of \$1,216.05. Defendant appeals.

Mraz and Boner, P.A., by Richard D. Boner, for defendant appellant.

Williams and Michael, P.A., by Robin S. Lymberis, for plaintiff appellee.

VAUGHN, Chief Judge.

The merits of plaintiff's claim are not before us. Defendant assigns as error the trial court's granting of Levine's motion to withdraw and its refusal to allow more than two days within which to prepare for trial or to obtain substitute counsel. We agree that the judge erred.

[1] It is fundamental that an attorney is not at liberty to abandon a case without (1) justifiable cause, (2) reasonable notice to his client, and (3) the permission of the court. *Smith v. Bryant*, 264 N.C. 208, 141 S.E. 2d 303 (1965); *Perkins v. Sykes*, 233 N.C. 147, 63 S.E. 2d 133 (1951); *State v. Penley*, 6 N.C. App. 455, 170 S.E. 2d 632 (1969), *cert. denied*, 276 N.C. 85 (1970). Whether Levine was justified in requesting withdrawal from the case is not at issue. Under no circumstances may an attorney of record be permitted

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to withdraw on the day of trial without first satisfying the court that he has given his client *prior* notice which is both specific and reasonable. Timely notice is a "first requirement" for withdrawal and was obviously absent in this case. *Smith*, 264 N.C. at 211, 141 S.E. 2d at 306. The trial court clearly erred by permitting Levine to withdraw without first receiving such assurances.

Plaintiff cites the "general rule [whereby] an attorney's withdrawal on the eve of trial of a civil case is not *ipso facto* grounds for a continuance." *Shankle v. Shankle*, 289 N.C. 473, 484, 223 S.E. 2d 380, 387 (1976). The decision to grant a continuance under such circumstances is within the trial judge's discretion. *Id.* Plaintiff's reliance on this authority is misapplied. The general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court and no such actions were taken in the present case. Where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion. The Court must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal.

[2] It is indisputable that defendant was prejudiced by the Court's actions. Defendant is an elderly woman and is in poor health. At trial, she had difficulty in speaking and in following the simple instructions of Judge Brown. A one or two day period was insufficient time for her to either prepare her own defense or acquire alternative representation. *See Smith, supra*. The fact that defendant was being sued by former legal counsel for nonpayment of attorney's fees would not make the latter task easier.

We, therefore, hold that defendant is entitled to a new trial. At such time, she may, if desired, be afforded the right to trial by jury pursuant to art. 1, sec. 25 of the North Carolina Constitution and Rule 38 of the Rules of Civil Procedure.

Judgement vacated. Remanded for new trial.

Judges WHICHARD and JOHNSON concur.

Arney v. Arney

CATHY ANN ARNEY v. BILLY RAY ARNEY

No. 8425DC432

(Filed 6 November 1984)

Rules of Civil Procedure § 38— jury trial waived by failure to make timely demand

Defendant waived his right to a jury trial on the issue of absolute divorce where he demanded a jury trial on absolute divorce on 9 February and the last pleading directed to that issue was his answer, filed 28 December 1983. Plaintiff's reply, served on 6 February 1984 and filed on 9 February 1984, dealt only with defendant's counterclaim for child custody and support. G.S. 1A-1, Rule 38(b).

APPEAL by defendant from *Tate, Judge*. Judgment entered 9 February 1984 in District Court, CATAWBA County. Heard in the Court of Appeals 25 October 1984.

The pertinent facts are not in dispute. Plaintiff filed her complaint on 2 December 1983 seeking an absolute divorce based on a year's separation, and seeking custody and support of the parties' minor child. On 28 December 1983 the defendant filed an "Answer and Counterclaim and Notice of Hearing" (hereinafter "answer") in which he admitted the facts alleged as the basis for the absolute divorce, realleged these same facts in his own request for an absolute divorce and counterclaimed for custody and child support. This pleading did not contain a demand for a jury trial.

Plaintiff served its "Reply and Prayer for Further Relief" (hereinafter "reply") on 6 February 1984, which was filed on 9 February 1984. This reply responded to allegations made in the answer concerning defendant's counterclaim for custody and child support; it also admitted the grounds for divorce which had been admitted and realleged by defendant in his answer.

On the day scheduled for hearing on plaintiff's action for absolute divorce, 9 February 1984, defendant filed and served a document demanding a jury trial on all issues. The trial court denied defendant's demand for jury trial and granted plaintiff an absolute divorce. Defendant appeals.

Rudisill and Brackett, P.A., by Keith Bridges, for plaintiff-appellee.

Randy D. Duncan for defendant-appellant.

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VAUGHN, Chief Judge.

This case presents a single issue: Did the trial court err when it ruled that defendant had waived his right to a jury trial on the issue of absolute divorce? We find no error and therefore affirm.

Rule 38(b) of the North Carolina Rules of Civil Procedure provides in part that "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." The defendant's answer was served on 28 December 1983; the plaintiff's reply was served on 6 February 1984 and filed on 9 February 1984. Defendant's demand for a jury trial was filed and served on 9 February 1984. If the last pleading directed to the issue of absolute divorce is plaintiff's reply, then the defendant's demand for jury trial was timely made; if the last pleading so directed is defendant's answer, then it was not.

Clearly, the defendant's answer is directed to the issue of absolute divorce, admitting as it does all allegations relevant to that issue. But is the plaintiff's reply also directed to this issue, thus rendering timely defendant's demand for a jury trial? We are compelled to conclude that it was not. Defendant's answer contains a counterclaim for custody and child support. The language in the section of that pleading denominated "counterclaim," seemingly directed toward the issue of absolute divorce, is extrinsic to the subject matter of the counterclaim and is, therefore, superfluous. As a legal matter, plaintiff's reply addresses only the issues of child custody and child support. Insofar as plaintiff's reply admitted the grounds for absolute divorce, it was only repeating what had been alleged in the complaint and then admitted and realleged in defendant's answer.

There are cases construing the substantially similar federal rule holding that a demand for a jury trial made within ten days of a reply does not necessarily cover issues raised in the complaint and answer, i.e., is not timely made, unless the counterclaim involved arises out of the subject matter of the complaint and is, therefore, compulsory. See *Tights, Inc. v. Stanley*, 441 F. 2d 336 (4th Cir.), cert. denied, 92 S.Ct. 90, 404 U.S. 852, 30 L.Ed. 2d 91 (1971); *Consolidated Fisheries Co. v. Fairbanks Morse*

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& Co., 9 F.R.D. 539 (E.D. Pa. 1949). Custody and child support are manifestly not in the nature of compulsory counterclaims to an action for absolute divorce. See G.S. 50-19. Therefore, defendant's demand for a jury trial, not made within ten days of its 28 December 1983 pleading, was not timely. The denial of a belated demand for a jury trial is within the discretion of the judge. *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972). The judgment granting plaintiff an absolute divorce is without error.

Affirmed.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. ROY McLAMB

No. 8412SC200

(Filed 6 November 1984)

1. Jury § 7.14— admission of incorrect statement by juror—refusal to permit peremptory challenge

The trial court erred in refusing to permit defendant to exercise a peremptory challenge to a juror who, after the jury was impaneled and the State made its opening statement, informed the court that she had made an incorrect response on *voir dire* as to whether she knew any of the State's witnesses and that she had had previous business dealings with one of the State's chief witnesses.

2. Narcotics § 2— conspiracy to sell or deliver cocaine—failure to allege buyer's name

An indictment for conspiracy to sell or deliver cocaine was not fatally defective because it failed to state the name of the person to whom defendant agreed to sell cocaine or to state that such person's name was unknown.

3. Narcotics § 5— sale or delivery—verdicts in disjunctive—ambiguity

Verdicts in the disjunctive finding defendant guilty of possession of cocaine with intent "to sell or deliver," "sale or delivery" of cocaine and conspiracy "to sell or deliver" cocaine were inherently ambiguous and do not support the judgments imposed.

APPEAL by defendant from *Brewer, Coy E., Judge*. Judgment entered 16 November 1983 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 18 October 1984.

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Defendant was indicted for possession of cocaine with intent to sell or deliver, sale or delivery of cocaine, and conspiracy to sell or deliver cocaine. Following trial, defendant was convicted of (1) possession with intent to sell or deliver cocaine; (2) sale or delivery of cocaine; and (3) conspiracy to sell or deliver cocaine.

At trial, the state's evidence showed that William Simons, an undercover agent with the Fayetteville Police Department, arranged and carried out a purchase of cocaine from defendant. Simons was assisted in his purchase by the efforts of Mary Sue Hammonds, an acquaintance of defendant. Simons first contacted Hammonds, seeking to buy cocaine. Hammonds called defendant and arranged a purchase of cocaine from defendant, then accompanied Simons to defendant's residence where she made the purchase from defendant and delivered the cocaine to Simons.

Defendant offered no evidence. Defendant has appealed all three convictions.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender David W. Dorey, for defendant.

WELLS, Judge.

[1] First, defendant assigns error to the refusal of the trial court to allow defendant to exercise a peremptory challenge to a juror who, after the jury was impaneled, informed the court that she had made an incorrect response on *voir dire* as to whether she knew any of the state's witnesses. The events on which this assignment is based were as follows. After the jury was impaneled and opening statements had been made by the state, but before the presentation of evidence, the trial judge indicated that a juror had admitted that she knew the state's witness Mary Sue Hammonds, stating that she had previous business dealings with Hammonds. Defendant's counsel then pointed out to the court that Hammonds was to be one of the state's chief witnesses and asked that the juror be removed for cause. After an examination by the trial court into the juror's relationship with Hammonds, this request was denied. Defendant's counsel then sought to remove the juror by exercising his last remaining peremptory challenge. This

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motion was also denied. The trial court's refusal to allow defendant to exercise his peremptory challenge denied defendant a fair trial and was reversible error. *See State v. Colbert*, 311 N.C. 283, 316 S.E. 2d 79 (1984).

[2] In his next argument, defendant contends that the conspiracy indictment was fatally defective because it failed to state the name of the person to whom defendant agreed to sell cocaine or, alternatively, to state that the person's name was unknown, relying on *State v. Bennett*, 280 N.C. 167, 185 S.E. 2d 147 (1971). In *Bennett* the court held that an indictment for sale (of a controlled substance) must state the name of the person to whom the sale was made or must allege in the alternative that the name of the person was unknown. We reject defendant's argument and refuse to extend the *Bennett* rule as to sale to indictments for conspiracy to sell and deliver controlled substances. In this case, the indictment charged defendant with conspiring with Hammonds and others "to sell or deliver cocaine." These allegations were sufficient to put defendant on notice as to the charge against him. *See State v. Bowen*, 56 N.C. App. 210, 287 S.E. 2d 458, *disc. rev. denied*, 305 N.C. 588, 292 S.E. 2d 7 (1982).

[3] Defendant's argument, however, has led us to an examination of the record proper, which discloses other errors. Each indictment in this case alleged the offenses of sale or delivery, in the disjunctive. This was incorrect. *State v. Helms*, 247 N.C. 740, 102 S.E. 2d 241 (1958); *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953).¹ Defendant not having moved to dismiss, he waived this defect for purposes of trial. *State v. Kelly*, 13 N.C. App. 588, 186 S.E. 2d 631, *rev'd on other grounds*, 281 N.C. 618, 189 S.E. 2d 163 (1972). In this case, however, the verdicts submitted to the jury were also in the disjunctive, *i.e.*, guilty of "possession with intent to sell or deliver"; guilty of "sale or delivery"; and guilty of conspiracy to "sell or deliver." These verdicts, being inherently ambiguous, do not support the judgments, *State v. Albarty, supra*, *State v. Creason*, 68 N.C. App. 599, 315 S.E. 2d 540 (1984), and require a new trial.²

1. We are aware that in *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984), another panel of this court has reached a different result. The *Rozier* court did not mention or discuss either *Helms* or *Albarty*.

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For the reasons stated, there must be a

New trial.

Judges ARNOLD and HILL concur.

ROBERT HEISER v. RUBY PLESS HEISER

No. 8328DC1269

(Filed 6 November 1984)

Divorce and Alimony § 29— divorce judgment regular on its face—standing of third party to attack

Plaintiff's action for annulment based on allegations that defendant's divorce from her husband was fraudulently obtained was properly dismissed where plaintiff did not contend and the record did not indicate that the divorce judgment on its face was irregular in any respect. Plaintiff therefore lacked standing to collaterally attack the judgment.

APPEAL by plaintiff from *Fowler, Judge*. Judgment entered 25 October 1983 in District Court, BUNCOMBE County. Heard in the Court of Appeals 24 September 1984.

Plaintiff-husband appeals from a judgment dismissing his action for annulment of his marriage to defendant-wife.

Holt, Haire & Bridgers, P.A., by Ben Oshel Bridgers, for plaintiff appellant.

Riddle, Shackelford & Hyler, P.A., by John E. Shackelford, for defendant appellee.

WHICHARD, Judge.

I.

The complaint prays that plaintiff-husband be granted an annulment of his "purported marriage" to defendant-wife on the following grounds: Plaintiff-husband and defendant-wife entered

2. We are aware that in *Rozier* another panel of this court apparently failed to find any fault with similar disjunctive verdicts. The *Rozier* court did not mention or discuss either *Albarty* or *Creason*. We follow *Creason*.

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into a ceremony of marriage on 12 July 1974. Plaintiff-husband entered the marriage in good faith and without notice or knowledge that defendant-wife had obtained a fraudulent divorce from her prior husband. Defendant-wife obtained the prior divorce by fraud in that she represented that her then husband resided in Buncombe County, the venue of that action, when in fact to her knowledge he resided in Haywood County. The Buncombe County court relied upon defendant-wife's false representation and was induced to assert jurisdiction over her then husband upon service by publication, when in fact the court could not obtain service by publication under the true facts and circumstances. Defendant-wife thus was still married to her prior husband when she purported to marry plaintiff-husband. Plaintiff-husband therefore is entitled to an annulment of the purported marriage under G.S. 51-3, which provides that a marriage between persons either of whom has a husband or wife living at the time is void.

Defendant-wife pled as a defense that "[t]his is an action to set aside a divorce and is not brought by the parties to said divorce and, therefore, does not state a claim upon which relief should be granted and should be dismissed. . . ." The trial court found that "the divorce judgment entered [in defendant-wife's Buncombe County action against her prior husband] . . . is in all aspects *regular on its face*; that this is an action brought not by the parties to said . . . action and that therefore this case should be dismissed. . . ."

From a judgment dismissing the claim, plaintiff-husband appeals.

II.

Plaintiff-husband did not except to the finding that the divorce judgment in defendant-wife's prior action against her former husband was in all respects regular on its face. He does not contend nor does the record indicate that the judgment on its face was irregular in any respect. He thus "does not have standing to attack collaterally the divorce decree . . . because he is a stranger to [it] who is not prejudiced as to some pre-existing right by [it]." *Maxwell v. Woods*, 47 N.C. App. 495, 497, 267 S.E. 2d 516, 517, *disc. rev. denied*, 301 N.C. 236, 283 S.E. 2d 132 (1980). *See also Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956) (since plaintiff-husband can rely upon the prior divorce decree,

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sounder view is to require him to do so rather than permit him to attack it at his election, depending on the fortunes or misfortunes of the marriage); 46 Am. Jur. 2d, Judgments § 663, p. 819 ("a collateral attack may not be made upon a judgment where the absence of jurisdiction does not appear upon the record"); 1 Lee, North Carolina Family Law § 92 (4th ed. 1979).

Pursuant to the foregoing authorities the trial court ruled correctly; the judgment accordingly is

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. ALBERT R. DICKEY

No. 8415SC150

(Filed 6 November 1984)

Criminal Law § 148.1— presumptive sentence—no appeal as of right

The Fair Sentencing Act does not allow an appeal of a presumptive sentence as of right. G.S. 15A-1444(a1).

APPEAL by defendant from *Lane, Judge*. Judgment entered 6 May 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 16 October 1984.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Van Camp, Gill & Crumpler, by James R. Van Camp, for the defendant appellant.

ARNOLD, Judge.

The defendant appeals the imposition of a presumptive sentence pursuant to the Fair Sentencing Act. The Act does not allow appeal of a presumptive sentence as of right. *See* G.S. 15A-1444(a1). The defendant's petition for writ of certiorari is denied and his appeal is dismissed.

Dismissed.

Judges WELLS and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 NOVEMBER 1984

IN RE COFFEY No. 8425DC96	Catawba (Heard in Burke Co. No. 83SP252)	Affirmed
LAURI ANN LYNCH No. 8415DC76	Alamance (83J17)	Affirmed
SANFORD v. SANFORD No. 8415DC110	Chatham (82CVD401)	Affirmed
STATE v. BASS No. 8419SC46	Cabarrus (83CRS8158) (83CRS8159) (83CRS8160)	No Error
STATE v. BOWENS No. 8324SC1235	Madison (83CRS189) (83CRS190)	No Error
STATE v. BRIGMAN No. 8427SC157	Gaston (83CRS15047)	No Error
STATE v. JOHNSON No. 843SC134	Pitt (83CRS5426) (83CRS5427) (83CRS5428)	No Error
STATE v. JONES No. 841SC145	Gates (83CRS333)	No Error
STATE v. LACKEY No. 8427SC117	Gaston (82CRS18867)	No error as to trial, vacated & remanded as to sentence
STATE v. LANCE No. 8428SC132	Buncombe (82CRS26000)	No Error
STATE v. McDOWELL No. 8327SC1315	Gaston (82CRS30126)	New Trial
STATE v. McLEOD No. 8410SC116	Wake (82CRS7416)	No Error
STATE v. WALTER No. 834SC1287	Onslow (82CRS15165)	Affirmed
WACHOVIA BANK v. COOPER No. 843DC64	Carteret (83CVD15)	Affirmed

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STATE OF NORTH CAROLINA v. MARK ASHTON DEANS

No. 8410SC109

(Filed 6 November 1984)

1. Homicide § 26— second degree murder—self-defense—evidence insufficient to dismiss charge

In a prosecution for second degree murder, there was no error in the denial of defendant's motion to dismiss the second degree murder charge and instruct only on voluntary manslaughter, based on imperfect self-defense, where the evidence, taken in the light most favorable to the State, led to a reasonable inference that defendant held the victim at gunpoint outside a trailer, forced the victim into the trailer at gunpoint, and shot the victim while the victim was defending himself from an attack by defendant.

2. Homicide § 21.8— perfect self-defense—evidence insufficient

Defendant's evidence of perfect self-defense, taken as true, showed that the victim returned to a trailer after demanding that defendant leave the premises and that defendant followed with a gun knowing the volatile circumstances. He therefore "aggressively and willingly entered into the fight" and perfect self-defense was not established as a matter of law.

APPEAL by defendant from *Preston, Edwin S., Judge*. Judgment entered 10 October 1983 in WAKE County Superior Court. Heard in the Court of Appeals 27 September 1984.

Defendant was tried by jury and found guilty of second degree murder in the shooting of Joseph Willie Hales. The state offered evidence which tended to show that on 4 April 1983 Lonnie Sloan and his wife, Teresa, were driving on Highway 70 in Wake County. Lonnie Sloan drove past Hales Auto Sales at approximately five miles per hour when he saw defendant, standing beside his truck, pointing a gun at Hales, who was standing some three feet from the office trailer and facing defendant. Sloan did not see anything in Hales' hand. Hales was backing toward the trailer.

Sloan turned onto Mechanical Boulevard and again saw defendant pointing a gun at Hales who continued to back toward the office. Sloan proceeded on Mechanical Boulevard, turned around, and returned to Hales Auto Sales approximately two minutes after last seeing defendant and Hales in the lot. Sloan saw defendant walking from the trailer to defendant's truck and saw him hand a gun to a female sitting in the truck. Defendant had blood

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on the left side of his head. Sloan went to a nearby telephone and called the police.

Patrolman Larry Garris, Garner Police Department, was sent to the scene in response to Sloan's report. He saw defendant's truck leaving Hales Auto Sales and stopped it. Patrolman Garris described defendant as bleeding profusely from head wounds and covered with blood to his feet. Defendant told Garris that a man, indicating someone at Hales Auto, had hit him with a hammer, but he did not tell Garris that he had shot anyone. Garris left defendant with Patrolman J. W. Pearce, who had independently arrived, and went to Hales' office. He found Hales lying on his right side between two wood stoves. Garris detected no pulse.

Patrolman Pearce returned to Hales Auto with defendant and his companion Sheila Franklin. He entered the office, inspected Hales, and thought he detected a pulse. Defendant was questioned, responding that Hales had hit him with a hammer and that he had shot him. Pearce recovered defendant's fully cocked gun from his truck.

Officer Albert Isley, Jr., a City-County Bureau of Identification crime scene specialist, performed a thorough premises search. He found a .22 caliber pistol near Hales' right hand. The magazine was loaded. No bullet was in the firing chamber and the gun's hammer was in a "safe cocked" position, rendering the gun incapable of firing.

A hammer was found at the left foot of the victim. Defendant's gun holster was underneath Hales' feet. A bullet fragment from defendant's gun was found at the rear of the trailer behind the office counter. On the counter, a telephone book was found opened to a page containing a listing for the Garner Police Department.

The trailer was spotted with a substantial amount of blood on the floor in the area of the deceased, the floor toward the door, and the porch. All of the blood was defendant's.

Outside the trailer, Isley found a bullet casing on the ground next to the office porch. Testing by the State Bureau of Investigation [hereinafter SBI] determined that the bullet fragment and shell casing came from defendant's gun. Defendant's gun automat-

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ically ejected an expended round to the right and slightly backwards. In Isley's opinion the gun was fired from the area of the door but it was impossible to have fired the weapon from inside the trailer and have the casing land on the ground outside the trailer. On recross examination, Isley admitted that the gun could have been fired anywhere from two feet inside the trailer to the porch. On redirect examination, Isley's opinion was that the gun was fired from the porch area and not inside the door.

The SBI also conducted powder burn tests on the deceased's vest through which the fatal shot entered. Deceased's vest had no powder residue. Powder residue would not have been present if the gun was fired five feet or more from its target.

Dr. Dawson Scarboro, a pathologist and certified as an expert witness, stated that the victim died from one gunshot wound that entered below the left armpit, severing the aorta, and exiting near the right armpit. The victim also had contusions and scratches on the left ear; contusion, scratches and a cut on the left of his lip; bruises on the forehead; and abrasions over the knuckles of the right hand.

Defendant had four lacerations on the head. They ranged from approximately one-half inch to slightly over one inch, but no concussion or fracture was present. One cut was on the top of the head, one on the left side, and two on the back of the head.

Defendant offered evidence which tended to show that he and Sheila Franklin were returning from a vacation weekend at the beach when they passed Hales Auto. He had consumed approximately one-half bottle of wine before leaving the beach. He saw a portable camper on Hales' lot, and he decided to stop. Defendant had never transacted business at Hales'.

Defendant and Franklin looked at a camper and Hales demonstrated it to defendant. Hales and defendant unsuccessfully negotiated for a purchase price, defendant stating he could buy a comparable camper at a competitor's for less. Hales became verbally abusive and ordered defendant to leave.

Defendant and Franklin returned to defendant's truck and began backing up to leave. Hales went to the office trailer and returned. Franklin saw Hales throw a coffeepot into defendant's

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windshield. Defendant parked the truck and exited. Hales approached from the rear of the truck, gun in his hand, ordering defendant to leave or be hurt. Defendant obtained his holstered gun from inside the truck, removed it, loaded the firing chamber and asked Hales to call the police. Defendant denied pointing his gun at Hales, but Franklin testified that both men pointed at each other. Hales lowered his gun to his side.

Defendant demanded that Hales call the police or pay for his windshield. Defendant retrieved the coffeepot, put it into the truck, and followed Hales into the office. Hales, standing behind a work counter, had the telephone receiver in his right hand and the gun in his left. Hales put the phone down and told defendant he would not call the police and to leave the premises. Defendant repeated his request that Hales call the police. Franklin stepped onto the porch near the door and pleaded with defendant to leave and get the police. Defendant turned to look at Franklin. Hales picked up a hammer. Franklin ran back to defendant's truck and as defendant turned toward Hales, Hales struck defendant on the left side of the head knocking defendant to the floor. Hales repeatedly struck defendant with the hammer as defendant got to his feet and tried to flee out the door.

As defendant started toward the door, Hales hit him in the back of the head again knocking defendant to the floor. Hales, kicking defendant and yelling that he was going to kill him, hit defendant twice more with the hammer. Defendant, on his knees just inside the door, fired one shot to repel the attack.

Defendant stumbled to his truck, put the gun on the dashboard, and Franklin assisted him into the truck. Franklin was driving the truck to the Garner Police Department when stopped by Patrolman Garriss.

The Garner Rescue Squad transported defendant to the hospital. In route, defendant told rescue personnel that Hales had gone into a rage.

Defendant offered several witnesses who had previous business dealings with Hales. On several independent occasions, Hales demonstrated a violent disposition and conduct in the course of business transactions.

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At the close of all the evidence, defendant moved, and the trial court denied, dismissal of the charge.

Attorney General Rufus L. Edmisten, by Associate Attorney General Michael Smith, for the State.

DeMent, Askew & Gaskins, by Johnny S. Gaskins, for defendant.

WELLS, Judge.

Defendant's single assignment of error is that the trial court erred in denying his motion to dismiss the charge of second degree murder at the close of all evidence. He argues that the evidence established, as a matter of law, perfect self-defense. We disagree and find no error.

The standards of appellate review for a denial of a motion to dismiss are well established. They are:

[W]hether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If substantial evidence of both of the above has been presented at trial, the motion is properly denied. . . . [T]he evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable in-tendment and every reasonable inference to be drawn therefrom. . . . Contradictions and discrepancies in the evidence are strictly for the jury to decide. . . .

State v. Lowery, 309 N.C. 763, 309 S.E. 2d 232 (1983) (citations omitted). Our supreme court has consistently held that "the court must consider the defendant's evidence which explains or clarifies that offered by the State. . . . The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. . . ." *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983) (citations omitted).

[1] Applying these principles to this case, we find substantial evidence of each essential element of second degree murder. Murder in the second degree is defined as "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978)

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(quoting *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971) (citations omitted)). While defendant has raised the issue of perfect self-defense only, we have carefully considered the closer question of whether or not the trial court should have instructed the jury only on voluntary manslaughter based on imperfect self-defense. Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Wilkerson*, *supra*.

When an individual intentionally takes the life of another with a deadly weapon, two presumptions arise: (1) unlawfulness and (2) malice. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056 (1982). See *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). If, as in this case, "there is evidence . . . of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence." *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977). In sum, the State maintained the burden of producing evidence that defendant killed Hales under circumstances not amounting to perfect or imperfect self-defense.

In the light most favorable to the State, evidence was produced that after Hales threw a coffeepot into defendant's windshield defendant assaulted Hales with a gun. Lonnie Sloan's testimony, albeit contradictory to that of defendant and especially that of Franklin, permits the finding that Hales was unarmed and the inference that defendant forced Hales into the trailer office at gunpoint. Uncontradicted testimony established that inside the trailer, Hales was using the telephone while defendant watched, and the inference that he was calling the Garner Police Department as demanded by defendant. Circumstantial physical evidence established that Hales, at some point, obtained a gun. Defendant's testimony that Hales had a gun in his left hand while using the telephone explains its presence and must be considered. Franklin's testimony that Hales picked up a hammer when she came to the door and started to come from behind the counter, confirmed by the physical evidence, must also be considered.

Defendant's version of the altercation is that Hales attacked him with the hammer, defendant attempted to flee, and defendant was forced to shoot Hales from inside the trailer to defend him-

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self. Physical evidence found at the scene clearly contradicts defendant's version of the shooting. The shell casing from defendant's gun was found outside the trailer. Isley's expert opinion was that the fatal shot came from outside the trailer door. Hales' vest had no powder burns on it. Scientific testing of defendant's gun permits the inference that the gun's muzzle was five feet or more from Hales' body when the fatal shot was fired. This inference contradicts defendant's testimony that he shot Hales while the latter was beating him with the hammer to "get [Hales] off of me. I was on my hands and knees and trying to get off the floor, and he was trying to beat me back onto the floor again. That is when I pulled the trigger."

Furthermore, Hales' physical condition indicates that defendant had struck him prior to the fatal shot. The record before us is devoid of any testimony by defendant of a fight between the two men. Yet, Dr. Scarboro found scratches on the deceased's left ear; contusion, scratches, and a cut on the lip; two apparent bruises on the forehead; and abrasions over the knuckles of the right hand. The fourth finding is consistent with defendant's testimony, but the first three findings are inconsistent with defendant's testimony and permit the logical inference that prior to the shooting defendant struck Hales.

Considered in the light most favorable to the State and after considering defendant's evidence consistent with that of the State, we hold that there was evidence leading to a reasonable conclusion that defendant held Hales at gunpoint outside the trailer, forced the victim into the trailer at gunpoint, and that Hales was shot while defending himself from an attack by defendant. These facts establish substantial evidence of every element of second degree murder. Accepting defendant's version that Hales initiated the circumstances leading to his death when he deliberately threw a coffeepot into defendant's windshield, and recognizing that the law in this state permits one to defend his property with reasonable force, nevertheless, absent use of felonious force by the aggressor, an individual may not endanger life or inflict serious bodily harm. *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979).

[2] Defendant argues that the evidence, as a matter of law, constituted perfect self-defense. Perfect self-defense requires that:

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- (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. . . .

State v. Norris, 303 N.C. 526, 279 S.E. 2d 570 (1981). Taking defendant's version of the incidents as true, he was not entitled to claim this absolute defense. He testified that Hales, after demanding that defendant leave the premises, returned to the office. Defendant intentionally followed Hales into the trailer with a gun knowing the volatile circumstances. Under these facts defendant "aggressively and willingly entered into the fight." *Id.*

Defendant was entitled to, and the trial court instructed the jury on, imperfect self-defense which reduces criminal responsibility to voluntary manslaughter. Imperfect self-defense arises where the first two elements of perfect-defense have been met, but either three or four has not been met. *State v. Norris, supra*. We considered, and the most salient question, was whether the trial court erred in not granting defendant's motion to dismiss the second degree murder charge and instruct only on involuntary manslaughter. The trial court did not so err because, as discussed above, the State presented substantial evidence of second degree murder even though the defendant introduced ample evidence from which the jury may have convicted on the lesser charge.

We hold that the State having proffered sufficient evidence of second degree murder, it was for the jury to resolve the contradictions and discrepancies. *State v. Lowery, supra*.

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No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. LENA FIELDS

No. 849SC37

(Filed 6 November 1984)

1. Criminal Law §§ 66.9, 66.16— pretrial photographic identification—not unduly suggestive—in-court identification of independent origin

There was no error in the denial of defendant's motion to suppress pretrial and in-court identifications where the court found that each witness had ample time to view defendant, that each witness gave a description which was similar in content, that the photographic lineup was conducted the day after the crimes were allegedly committed, that each witness immediately picked defendant's photograph, that the photographic lineup was not so unnecessarily suggestive and conducive as to constitute a denial of due process, and that the witnesses' in-court identifications of defendant were of independent origin and did not result from any pretrial identification procedures.

2. Larceny § 7— credit card theft—evidence sufficient

In a prosecution for credit card theft, the trial court properly denied defendant's motion to dismiss where the evidence tended to show that defendant was observed in a portion of the Area Mental Health Center not open to the public, that defendant was seen by a worker at the Center near the worker's pocketbook, that defendant appeared startled and fled from the area when she was seen, that credit cards and twenty dollars were taken from a pocketbook elsewhere in the building, that two other witnesses saw defendant in the Center, and that defendant attempted to use one of the stolen cards at a bank on the same morning it was stolen.

3. Larceny § 7.4— credit card theft—doctrine of recent possession

In a prosecution for credit card theft, the State is entitled to the benefit of the doctrine of recent possession where the evidence gives rise to a logical and legitimate inference that defendant had possession of a stolen card and used it to activate a teller machine, and where the evidence also gives rise to the logical deduction that defendant is unlikely to have obtained possession of the card honestly.

4. Receiving Stolen Goods § 6; Larceny § 8— instruction on receiving stolen credit card—evidence showed only theft—error

The court erred by instructing the jury on receiving a stolen credit card where defendant was indicted for credit card theft, the evidence was of credit

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card theft, there was no evidence of receiving, and the jury returned a verdict of "guilty of credit card theft."

APPEAL by defendant from *Herring, Judge*. Judgment entered 19 August 1983 in Superior Court, VANCE County. Heard in the Court of Appeals 24 September 1984.

In case #82CRS6016, defendant was tried and convicted of misdemeanor larceny of personal property belonging to Geraldine Winston; in case #82CRS6017, defendant was indicted, tried and convicted of "credit card theft." From a judgment imposing an active term of one year for misdemeanor larceny and one year for credit card theft, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Willie S. Darby, for defendant appellant.

JOHNSON, Judge.

The State offered evidence which tended to show that on 13 September 1982, defendant was observed in an office at the Area Mental Health Center acting in a suspicious manner. During the time defendant was at the Health Center, someone entered Geraldine Winston's office and took Ms. Winston's credit cards and twenty dollars from her pocketbook in her desk drawer. Shortly thereafter, defendant appeared at Peoples Bank and used one of the credit cards taken from Ms. Winston's pocketbook.

Defendant testified in her own behalf and denied being at the Area Mental Health Center or Peoples Bank at any time on 13 September 1982. Defendant also introduced testimony of several alibi witnesses. Other pertinent facts will be set forth in the opinion as we discuss the issues.

[1] By her first assignment of error, defendant contends the court erred in the denial of her motion to suppress testimony of pretrial and in-court identifications.

Officer Arnold Bullock investigated the incident and on 14 September 1982 showed identification witnesses a photographic lineup. Each witness immediately picked defendant's picture out of this lineup as the person they saw either at the Area Mental

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Health Center or at Peoples Bank on 13 September 1982. Defendant argues that the pretrial identification procedure was impermissibly suggestive where defendant's photograph was the only one which resembled the identification witnesses' description in every respect. Defendant argues under the same assignment of error that the in-court identifications were tainted by the pretrial photographic lineup procedure and should have been excluded.

The appropriate standard as to the admissibility of photographic identifications has been stated as follows:

Identification evidence must be excluded as violating a defendant's rights to due process where facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification. (Citations omitted.)

State v. Barnett, 307 N.C. 608, 627, 300 S.E. 2d 340, 350 (1983).

In the case *sub judice*, the court found that each witness had ample opportunity to view defendant on 13 September 1982 at the time in question either at the Area Mental Health Center or at Peoples Bank; that each witness gave a description of the person she observed and each description was similar in content; that the photographic lineup was conducted the day after the crimes were allegedly committed; that each witness immediately picked defendant's photograph as the person they had observed either at the Center or at Peoples Bank; that the photographic lineup was not so unnecessarily suggestive and conducive as to lead to an irreparable mistaken identity as to constitute a denial of due process; that the witnesses' in-court identification of defendant was of independent origin, based solely upon what the witnesses observed at either the Area Mental Health Center or Peoples Bank, and did not result from any pretrial identification procedures.

We have carefully examined the record, the briefs and pretrial photographic array viewed by the witnesses and find that the trial court's ruling is supported by overwhelming competent evidence. The pretrial photographic lineup was not impermissibly suggestive. Further, it is clear from the record that the in-court identifications were based solely upon what the witnesses observed about the defendant on 13 September 1982 and not any-

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thing related to the photographic lineup. This assignment of error is without merit.

[2] By her second assignment of error, defendant contends the court erred in denying defendant's motion to dismiss at the close of all the evidence. Defendant argues that the State's evidence fails to show that defendant took or had possession of any of Geraldine Winston's property; that there was inadequate evidence to support a finding of possession of recently stolen property so as to apply the doctrine of recent possession and the resulting presumption arising therefrom. We disagree.

The State offered evidence which tended to show the following. On 13 September 1982, between 10:00 and 11:00 a.m., defendant was observed at the Area Mental Health Center in the office of Mary Libby Robertson. Ms. Robertson's office was not open to the general public or patients of the center. Defendant was not an employee or patient of the center. Ms. Robertson was not in her office at the time. Upon returning to her office, Ms. Robertson saw defendant standing in her office within reach of her pocketbook which she had left on a shelf. Defendant appeared startled when she saw Ms. Robertson, turned and rushed from the office. Geraldine Winston, a secretary at the Area Mental Health Center, testified that during the same morning in question, someone entered her desk drawer and took her credit cards and twenty dollars from her pocketbook which was inside the drawer. One of the cards taken was a Peoples Bank automatic teller card. She gave no one permission to take her property. Two other witnesses also testified that they saw defendant at the Area Mental Health Center the morning of 13 September 1982.

The State's evidence further showed that between 11:00 a.m. and 12:00 noon, 13 September 1982, defendant entered the Peoples Bank and inquired of two bank employees, Catherine Abbott and Linda Davis, if the automatic teller machine was operating. At that moment the automatic teller was being serviced by Ms. Davis. Defendant waited in the bank's lobby for approximately five to ten minutes until the teller machine had been serviced. When told that the machine was ready for use, defendant immediately went outside to use the machine. Almost immediately, the automatic teller machine was activated and immediately captured Geraldine Winston's Peoples Bank teller card which had

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been recently stolen. The card was immediately retrieved by a bank employee at which time defendant stuck her head in the door of the bank and asked, "Is that card expired?" Upon being advised that Ms. Winston's card was expired, defendant left.

The State relies upon circumstantial evidence to prove defendant's guilt. Circumstantial evidence is evidence of facts from which other facts may be logically and reasonably deduced. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). An essential fact may be proved by circumstantial evidence where the circumstances raise a logical inference of the fact to be proved and not just a mere conjecture or surmise. *State v. Jones, supra*. When a motion to dismiss raises the question of the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt can be drawn from the circumstances. If a reasonable inference of defendant's guilt can be drawn from the circumstances, it then becomes a question for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965).

[3] The evidence set forth above does more than raise a suspicion or conjecture. It gives rise to a logical and legitimate inference or deduction that defendant had possession of Ms. Winston's Peoples Bank teller card and used it to activate the teller machine. This evidence also gives rise to the logical deduction that defendant, possessing the card so soon after it was stolen and under such circumstances, is unlikely to have obtained possession of the card honestly. Consequently, the State was entitled to the benefit of the doctrine of "recent possession" and the presumption arising therefrom, that defendant took Ms. Winston's Peoples Bank card and twenty dollars from Ms. Winston's pocketbook on the morning of 13 September 1982. Based upon these circumstances, the trial court properly denied defendant's motion to dismiss.

[4] By her final assignment of error, defendant contends the trial court incorrectly instructed the jury as to the law regarding the charge of theft of a financial transaction card, commonly known as "credit card theft." We agree and order a new trial in case #82CRS6017 on "credit card theft."

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Defendant was indicted on a charge of "credit card theft." The State's evidence tended to show a crime of credit card theft and indeed the jury returned a verdict of "Guilty of credit card theft." However, the trial court instructed the jury on the law of "receiving stolen property," a separate and distinct crime from the crime of larceny. An instruction on receiving does not arise on the evidence presented in this case since there is no third party involved. *State v. Brunson*, 51 N.C. App. 413, 276 S.E. 2d 455 (1981).

Defendant correctly states the principles of law that the chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict; and that it is prejudicial error to instruct in regard to law not presented by the evidence. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976); *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971). Also, a charge must be construed as a whole, and isolated portions of a charge will not be held to be prejudicial where the charge as a whole is correct. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

In the case at bar, defendant challenges the trial court's instructions on the charge on "credit card theft." The trial court gave the following instructions:

- (1) [In] Case Number 82CRS6017, which alleges that the defendant, on or about the 13th day of September, 1982, committed the crime of credit card theft as it is designated, and to which the defendant has entered a plea of not guilty.
- (2) I instruct you, members of the jury, that in order for you to find the defendant guilty of credit card theft, the State must prove four things beyond a reasonable doubt:
- (3) First, the State must prove beyond a reasonable doubt that on or about the 13th day of September, 198[2], the defendant, Lena Fields took or obtained or had possession of a Peoples Bank credit card number 070115567, which was issued to Geraldine Winston.
- (4) I instruct you, members of the jury, that the burden on the State as to this first thing that the State must prove

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does not require the State to prove that this defendant stole that card, but it does require that it prove that the defendant at least obtained or had possession of that particular Peoples Bank debit card which had been issued to Geraldine Winston.

(5) The second thing the State must prove is that that particular bank debit card had been stolen earlier, either by the defendant or by someone else, or taken without Geraldine Winston's consent.

(6) The third thing the State must prove beyond a reasonable doubt is that this defendant knew at the time that it had been so taken; and

(7) The fourth thing the State must prove is that the defendant intended to use that card to withdraw cash from Peoples Bank, whether or not it was actually used by her, and whether or not any cash was actually obtained, and whether or not the card had expired.

(8) So it is immaterial as to the fourth requirement which is placed upon the State that the card may have expired at the time it was presented and was incapable of having perpetrated a fraud.

(9) The law punishes the criminal intent to use that card, whether it is actually capable of being used or not, and whether or not the number combination that the evidence would tend to show is necessary to go along with the use of the card in order to accomplish a withdrawal of funds from the account.

. . .

(10) Finally, as to this charge of credit card theft, I instruct you, members of the jury, that if you find from the evidence presented and beyond a reasonable doubt that on or about the 13th day of September, 1982, the defendant, Lena Fields, either took or obtained or received or possessed the Peoples Bank card issued to Geraldine Winston which she knew had previously been taken without Geraldine Winston's consent, and that the defendant intended to use that card to obtain money, whether or not it was actually capable of obtaining

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money, then it would be your duty to return a verdict of guilty as charged.

A close reading of the above challenged instructions, particularly paragraphs 4, 5, 6 and 10, reveals that the jury was instructed and allowed to rely on a theory of receiving a stolen credit card when in fact defendant was indicted for credit card theft; further, there was no evidence to support a theory of receiving. The challenged instruction is basically consistent with North Carolina Criminal Pattern Jury Instruction 219 B. 11, titled, "Credit Card Theft—Receiving Stolen Card." An instruction consistent with North Carolina Criminal Pattern Jury Instruction 219 B. 10, titled, "Credit Card Theft—Taking" is the proper instruction the trial court should have given under the indictment and evidence of this case. Accordingly, defendant is entitled to a new trial in case #82CRS6017.

In summary, we find no error in defendant's trial in case #82CRS6016 on the misdemeanor charge. We find prejudicial error in case #82CRS6017 charging "credit card theft."

Case #82CRS6016, no error.

Case #82CRS6017, new trial.

Chief Judge VAUGHN and Judge WHICHARD concur.

JAMES R. SMITH v. BARBARA WYITE SMITH

No. 837DC636

(Filed 6 November 1984)

1. Divorce and Alimony § 21.9— equitable distribution—improper findings of fact

An equitable distribution order awarding sole ownership of the marital home, the only marital asset, to plaintiff husband must be vacated where some of the court's findings are improperly based on marital fault, and other findings involve matters which G.S. 50-20 expressly excludes from consideration in determining the distribution of marital property. G.S. 50-20(c)(3) and (6); G.S. 50-20(f).

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2. Divorce and Alimony § 21.9— equitable distribution—proper findings

Findings as to the need of a parent with custody of the children of the marriage to own the marital residence and as to contributions made by the husband for the wife to obtain a Master of Library Science degree, thus advancing her career, were appropriate for consideration by the court in determining the distribution of marital property. G.S. 50-20(c)(4) and (7).

3. Divorce and Alimony § 21.9— equitable distribution of marital property—proper and improper findings—remand for new order

Where an equitable distribution order contained findings which the court properly could consider and findings which it could not, the cause must be remanded for a new equitable distribution award based solely on appropriate findings.

APPEAL by defendant from *Harrell, Judge*. Order entered 21 February 1983 in District Court, EDGECOMBE County. Heard in the Court of Appeals 24 September 1984.

Defendant-wife appeals from an equitable distribution order awarding sole ownership of the marital home, the only marital asset, to plaintiff-husband.

Moore, Diedrick, Whitaker & Carlisle, by Joy Sykes, for plaintiff appellee.

Evans & Lawrence, by Antonia Lawrence, for defendant appellant.

WHICHARD, Judge.

[1] Plaintiff-husband brought this action against defendant-wife seeking an absolute divorce and an equitable distribution of the marital property pursuant to G.S. 50-20. Plaintiff specifically sought absolute fee simple title to the former marital home, the only asset to be divided and owned by plaintiff and defendant as tenants by the entirety. Defendant-wife also requested absolute divorce and equitable distribution of marital property. The trial court awarded sole ownership of all marital property, i.e., the marital home, to plaintiff-husband. The propriety of that award is the sole issue. Because the court may have based its award on improper considerations, we vacate and remand for entry of a new order.

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I

In *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772, 775 (1984), this Court stated that G.S. 50-20 "sets forth a presumption of equal division which requires that the marital property be equally divided between the parties in the usual case and in the absence of some reason(s) compelling a contrary result." The presumption may be overcome.

If, in a particular case, the court concludes after its . . . consideration of all . . . the statutory factors and . . . any non-statutory factor raised by the evidence which is reasonably related to the rights to, interest in, and need for the marital property, that an equal division is not equitable, the trial court may properly order an unequal division [It] should clearly set forth in its order findings of fact based on the evidence which support its conclusion that an equal division is not equitable.

Id. at 552, 315 S.E. 2d at 775-76. If the trial court proceeds as above, a "proper order" results which will not be reversed on appeal unless the record indicates an obvious miscarriage of justice. *Id.* at 552, 315 S.E. 2d at 776.

II

For purposes of this case, *Alexander* should be construed in conjunction with *Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984). In enacting the equitable distribution statutes, G.S. 50-20, -21, the General Assembly failed to specify "whether fault or misconduct is an appropriate factor to be weighed in making the distribution." Note, The Discretionary Factor in the Equitable Distribution Act, 60 N.C. L. Rev. 1399, 1403 (1982). This Court has held, however, that "the position most consistent with the policy and purpose of [the] statutes is . . . that fault is not a relevant or appropriate consideration in determining an equitable distribution of marital property." *Hinton*, 321 S.E. 2d at 163. "[I]t was not the intent of our Legislature . . .," the Court stated, "to give courts the inherently arbitrary power to place a monetary value on the misconduct of a spouse in dividing property." *Id.* at 669, 321 S.E. 2d at 163. While Judge Becton dissented, believing that under the facts of that case the trial court had fulfilled the legislative intent and had not relied on fault, he agreed "that fault in the abstract

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should not be considered in equitably distributing marital property" *Id.* at 673, 321 S.E. 2d at 165.

III

In light of the *Hinton* holding on fault, the "proper order" contemplated in *Alexander*, 68 N.C. App. at 552, 315 S.E. 2d at 776, is not before this Court. The pertinent findings of fact made by the trial court are as follows:

14. The circumstances of the instant case and of the respective parties hereto warrant that an equal division of the marital property is not equitable based on the following facts:

a. The Defendant abandoned the Plaintiff and the two minor children willfully, without justification, without the knowledge or consent of the Plaintiff and without any intent to renew the marital relationship.

b. The Defendant is an excessive user of alcoholic beverages, having frequented illegal "whiskey houses" and having failed to properly supervise and care for the minor children prior to the separation.

c. On several occasions the Defendant left the children with a babysitter until very late at night and on one occasion the babysitter called the Plaintiff father at three o'clock a.m. to pick up the minor children.

d. During the year that the Plaintiff and Defendant have been separated, the Defendant has not visited with the children on a regular basis, having seen them approximately five or six times for a maximum period of a few hours, nor has the Defendant provided the minor children with clothing or other necessities.

e. The Defendant is not at the present time contributing anything towards the support and maintenance of the minor children born and adopted to the marriage of the Plaintiff and Defendant.

f. The Plaintiff needs continued possession and ownership of the former marital home for the benefit of the minor children.

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g. The Defendant holds the degree of Master of Library Science and is gainfully employed with the Nash County Board of Education earning a net income of approximately \$11,000.00 per year.

h. The Plaintiff is retired from the Marine Corps and has been required to support the minor children and provide for all of the household bills including the mortgage payment for the former marital home, with his retirement pay of approximately \$800.00 to \$900.00 per month.

i. The Plaintiff provided for the Defendant to obtain her degree of Master of Library Science, thus advancing her career as a teacher and allowing her to earn a better salary.

j. The [Plaintiff] has made all of the monthly payments on the outstanding indebtedness on the marital home from his salary and retirement from the Marine Corps.

k. The Plaintiff has masonry, carpentry and other similar skills and has contributed substantially to the value of the home by making such improvements as enclosing the carport, building a brick barbeque, insulating, painting and other improvements. The Plaintiff has also provided the purchase price of the materials necessary to make these improvements.

l. During the time that the Plaintiff was overseas in connection with his service in the military, the Defendant provided the minor children with basic care such as cooking meals and buying clothes, the majority of the expenses being paid for by the Plaintiff father; however, the Defendant has not contributed in a meaningful way to the marriage since then, either financially or emotionally.

m. In all likelihood, the Plaintiff father will be required to provide all the costs of educating the minor children.

n. Any funds awarded to the Defendant mother from the equity in the former marital home would probably not be used in any manner to benefit the minor children, based upon the Defendant's past history of alcoholism and lack of responsibility.

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On the basis of these findings the court entered the following pertinent conclusions of law:

3. The following is all of the marital property that is to be divided between the Plaintiff and Defendant: a house and lot located at 116 Washington Place, Rocky Mount, Edgecombe County, North Carolina.

4. Based on the circumstances of the instant case, an equal division of the marital property would not be equitable.

5. Based on the circumstances of this case, the Plaintiff father should receive sole ownership of the former marital home.

It thereupon granted the following award:

2. The Plaintiff is hereby awarded sole ownership of the former marital home of the parties located at 116 Washington Place [,] Rocky Mount, Edgecombe County, North Carolina[.] [T]he Defendant shall execute a deed conveying all of her right, title and interest in said property to the Plaintiff.

3. The Plaintiff shall be solely responsible for payment of the outstanding indebtedness on said property.

Findings 14(a) through (d) clearly are fault-based. Consideration of those findings in determining the distribution of marital property thus is improper. We note, however, that some of those findings relate to defendant-wife's alcoholism. While the order here improperly relies on defendant-wife's alcoholic condition to impute fault, the condition may be a relevant consideration for other purposes, since "the physical and mental health" of the parties is an appropriate factor in determining an equitable distribution of the marital property. G.S. 50-20(c)(3).

Findings 14(e), (m) and (n) involve defendant-wife's present and prospective failure to contribute toward the support and education of the minor children born and adopted to the marriage. G.S. 50-20(f) directs that "[t]he court shall provide for an equitable distribution without regard to . . . support of the children of both parties." Consideration of these findings in determining the distribution of the marital property thus is also improper.

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Finding 14(k) appears to refer to G.S. 50-20(c)(6), a statutory factor related to the equitable claim of a partner in marital property in which the other partner has sole title. The factor does not relate to an equitable distribution of marital property held by the partners as tenants by the entirety. Consideration of that factor is thus irrelevant and therefore improper.

Finding 14(l) in part refers to defendant-wife's failure to contribute "emotionally" to the marriage. While the Court can envision a situation in which emotional support would be a relevant consideration, in the context of this case that portion of finding 14(l) which refers to a failure to contribute emotionally appears fault-based and thus improper.

[2] Two of the court's findings, however, are clearly appropriate for consideration under the applicable statute. G.S. 50-20(c)(4) directs the court to consider "[t]he need of a parent with custody of a child or children of the marriage to occupy or own the marital residence" In finding 14(f) the court, pursuant to this provision, found such a need. G.S. 50-20(c)(7) directs the court also to consider "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other" In finding 14(i) the court, pursuant to this provision, found that plaintiff-husband had provided for defendant-wife to obtain a Master of Library Science degree, thus advancing her career.

[3] The order thus contains findings which the court properly could consider and findings which it could not. As in *Hinton*, "it is not entirely clear what evidence the court felt was determinative in reaching its conclusion that an equal division was not equitable." *Hinton*, 70 N.C. App. at 671, 321 S.E. 2d at 165. The situation thus presented resembles that in cases under the Fair Sentencing Act in which the trial court makes both appropriate and inappropriate findings in aggravation or mitigation of a presumptive criminal sentence; because the reviewing court cannot determine whether the erroneous findings affected the sentence, those findings require remand for a new sentencing hearing. See *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983). Similarly, the erroneous findings here require remand for a new equitable distribution award based solely on appropriate findings not grounded in marital fault or statutorily impermissible considerations.

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As stated in *Hinton*:

[O]n remand the court may possibly again conclude that an equal distribution is not equitable and order the same or similar distribution as originally ordered; but if [it] does so, it must support its conclusion and distribution with adequate findings based on proper evidence and statutory factors and not on evidence of the fault of the parties.

Hinton, 70 N.C. App. at 672, 321 S.E. 2d at 165. While the court could again award the marital home to plaintiff-husband based solely on the conclusion, pursuant to G.S. 50-20(c)(4), that as the custodial parent he has a need to occupy or own it, that conclusion must be supported by evidentiary-based findings which justify it. It must also be reached in light of the presumption of equal division which the statute raises. *Alexander*, 68 N.C. App. at 552, 315 S.E. 2d at 775. The court "should state in its order the basis and reasons for its division." *Id.*

Finally, the order should contain detailed findings regarding defendant-wife's contributions to the marriage—*e.g.*, whether and for how long she contributed her \$11,000 annual salary to the marriage and whether and to what extent her role as homemaker and child care provider during plaintiff-husband's overseas absences contributed to his career development.

Because (1) some of the findings are fault-based and therefore improper for consideration in determining the distribution of the marital property, *Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161, and (2) others involve matters which the applicable statute expressly excludes from consideration, the order is vacated. The cause is remanded for further proceedings, if necessary, and for entry of a new order based solely on findings which the court properly may consider.

Vacated and remanded.

Chief Judge VAUGHN and Judge JOHNSON concur.

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DR. ANTHONY J. VAGLIO, JR. (D/B/A VAGLIO FINANCIAL ENTERPRISES), MILT COHEN, AND DAVID WEDDINGTON, COLLECTIVELY D/B/A CENTURY 21 A-1 v. TOWN AND CAMPUS INTERNATIONAL, INC., A MISSOURI CORPORATION, TOWN AND CAMPUS, INC., A MISSOURI CORPORATION, BONHOMME EQUITIES, INC., A MISSOURI CORPORATION, JOSEPH O. MORRISSEY, JR., RICHARD M. ZITZMANN, CALMARK ASSET MANAGEMENT, INC., A DELAWARE CORPORATION, AND GEORGE B. BREWSTER

No. 8310SC1165

(Filed 6 November 1984)

1. Rules of Civil Procedure § 60— denial of motion for relief—no request for findings—findings not required

Trial courts are required to make findings of fact when denying Rule 60(b) motions if findings are requested, but are not required to do so when findings are not requested. G.S. 1A-1, Rule 52(a)(2).

2. Rules of Civil Procedure § 60; Appeal and Error § 28.2— denial of Rule 60(b) motion—no findings—question on appeal

Where no findings of fact were made in the trial court's denial of plaintiff's Rule 60(b) motion, the question on appeal becomes whether there was evidence from which the court could have made sufficient findings of fact.

3. Rules of Civil Procedure § 60.2— denial of Rule 60(b)(3) motion—evidence sufficient

There was sufficient evidence for the court to deny plaintiff's Rule 60(b)(3) motion for relief from judgment, made on the grounds that defendants allegedly misrepresented to the court the nonexistence of a contract, where the court examined the document purported to be a contract and ruled as a matter of law that no contract existed.

4. Rules of Civil Procedure § 60.2— denial of motion for relief—surprise or excusable neglect not shown

There was no abuse of discretion in the denial of plaintiff's motion for relief based on mistake, inadvertence, surprise, or excusable neglect in the failure of plaintiff's counsel to submit affidavits and other evidence where defendants' motion was filed on 9 March and originally calendared for 9 September, then continued and heard on 20 September; plaintiff received notice from opposing counsel; and plaintiff's attorney did not object. G.S. 1A-1, Rule 60(b)(1).

5. Rules of Civil Procedure § 56— summary judgment granted before discovery complete—no abuse of discretion

There was no abuse of discretion in the granting of summary judgment before discovery was complete where discovery had been in progress for at least six months, the trial judge had concluded that defendants were answering the interrogatories in good faith and declined to impose sanctions, plaintiff had ample time to gain useful information and filed new interrogatories only after receiving notice of the summary judgment motions, and the trial court ruled

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as a matter of law that no genuine issue of material fact existed. The rule that summary judgment should not be granted while discovery is pending presupposes that any information gleaned will be useful.

6. Rules of Civil Procedure § 60.2— denial of motion for relief—issues not raised in trial court—no abuse of discretion

In an action to recover on a brokerage contract, the court did not abuse its discretion in denying plaintiff's Rule 60(b)(6) motion for relief based on the failure of the court or counsel to raise the issue of whether defendant had procured a ready, willing, and able buyer. Plaintiff was not prevented from raising the issue and it is not the duty of the court to raise issues and litigate cases for the parties.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 20 June 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 28 August 1984.

Plaintiff filed this action to recover a brokerage commission alleging fraud, conspiracy to defraud, misrepresentation, and unfair trade practices. Plaintiff, a licensed real estate broker, was hired during the fall of 1979 by the defendants to procure buyers for various apartment complexes owned and operated by the defendants. On 11 December 1979, the parties entered into an agreement where defendants agreed to pay plaintiff two and one-half percent commission based on the gross consideration for property sold to any clients furnished by the plaintiffs. Pursuant to this agreement, plaintiff, Anthony J. Vaglio, arranged a meeting between the defendants and Calmark Asset Management, Inc. (hereinafter Calmark) on 6 March 1980. At this meeting, an oral offer to purchase property of the defendants was made. Plaintiff was then contacted and asked to accept a reduced commission, which he declined to do. There was no further communication between plaintiff and defendants.

The defendants and Calmark entered into a conditional sales agreement concerning the property listed with the plaintiffs. The agreement was conditioned: (1) upon the proposed property being approved by the limited partners of the owner; (2) upon the agreement of United Insurance Company to forebear enforcement of the due on sale clause contained in the prior note. Neither of the conditions were met and the property was never sold.

Plaintiff commenced this action in 9 February 1981 alleging that the conditional sales agreement was a contract to sell. On 9

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March 1981, defendants filed a motion for summary judgment. Between 9 March 1981 and 20 September 1982, affidavits were filed in support of the summary judgment motion by the defendants. Plaintiff on 21 October 1981 entered a voluntary dismissal as to defendants Calmark and George B. Brewster, but proceeded against the remaining defendants.

On 10 May 1982, the plaintiff filed a motion for imposition of sanctions against the defendants for failure to answer interrogatories. The court, in its order, found that the defendants had in good faith attempted to answer the interrogatories, but ordered the defendant to be more specific in answering certain interrogatories. The court declined to enter sanctions against the defendants. On 9 August 1982, plaintiff filed further interrogatories and requests for documents upon the defendant. Defendant filed a motion for protective order which was calendared for 24 August 1982. Defendants' summary judgment motion was calendared for 9 September 1982. Both motions were continued.

The summary judgment motion was then calendared for 20 September 1982. Plaintiff's attorney requested the Trial Court Administrator to place the Protective Order motion on the calendar for the same date. Thereafter, by letter dated 10 September 1982, defendants' attorney notified plaintiff's counsel of the request that both motions be heard on 20 September 1982. There was no objection by plaintiff's attorney. The motion for summary judgment was granted in favor of the defendants on 20 September 1982. Plaintiff filed Notice of Appeal more than ten days after judgment was entered, whereupon defendants filed a motion to dismiss the appeal. On 1 February 1983, plaintiff withdrew the Notice of Appeal. Thereafter, on 2 May 1983, plaintiff filed a motion to set aside the judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. On 22 June 1983, the trial court denied plaintiff's motion to set aside the judgment. From the denial of this motion, plaintiff appeals.

Marc W. Sokol, for plaintiff appellant.

Bryant, Drew, Crill & Patterson, P.A., by Victor S. Bryant, Jr., for defendant appellee.

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JOHNSON, Judge.

[1] This is an appeal from an action to obtain relief from judgment pursuant to Rule 60(b)(1), (3) and (6) of the Rules of Civil Procedure. G.S. 1A-1. The rule, in pertinent part, reads as follows:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(6) Any other reason justifying relief from the operation of the judgment. . . .

In denying the plaintiff's 60(b) motion, the trial court did not make any findings of fact. Had it been requested to do so, it would have been error for the court not to have found the facts. *Sprinkle v. Sprinkle*, 241 N.C. 713, 86 S.E. 2d 422 (1955). However, absent a request it was not required to do so. G.S. 1A-1, Rule 52(a)(2). The record in the present case does not disclose any request that the court make findings of fact.

[2, 3] The question for this court thus becomes whether, on the evidence presented to the trial court, the court could have made findings of fact sufficient to support its denial of plaintiff's motion. In support of the motion, plaintiff submitted affidavits on its behalf that the trial court examined. Plaintiff alleges in one instance that relief should be granted pursuant to Rule 60(b)(3) because the defendant misrepresented to the court the nonexistence of a contract. By plaintiff's own admission, he states that the document, "purportedly a contract," was brought to the attention of the court. There were no findings of fact made, but we must conclude that the trial judge did not take defendants' bare allegation of the nonexistence of a contract in its order to grant summary judgment and in the other order to deny plaintiff's motion for relief from judgment. The trial judge examined the document before him and decided as a matter of law that no contract

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existed between the parties. From a careful reading of the record, there was sufficient evidence for the court below to deny plaintiff's motion for relief from judgment. In light of the judge's decision that no contract existed, we fail to find any fraud, misrepresentation or misconduct on the part of the defendants to warrant any relief. We find plaintiff's argument without merit.

[4] Plaintiff next contends that relief should be granted on the ground of mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1). Specifically, plaintiff argues that he was effectively prevented from opposing the defendants' motion for summary judgment by failure of plaintiff's counsel to submit affidavits and other evidence on the motion due to the fact counsel did not know summary judgment would be heard on 20 September 1982. Plaintiff argues that his attorney's negligence and failure to file affidavits should not be imputed to him. We disagree.

Where it appeared, upon the defendant's motion to set aside a default judgment, that the same had been regularly calendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, his attorney's negligence was imputed to him. His neglect was not excusable.

Dishman v. Dishman, 37 N.C. App. 543, 246 S.E. 2d 819 (1978) (citing *Gaster v. Thomas*, 188 N.C. 346, 124 S.E. 609 (1924)). The motion for summary judgment was filed on 9 March 1981 and was originally calendared in the trial court for 9 September 1982. This was ample time for the plaintiff to file affidavits in opposition to the motion. Although the motion was originally calendared to be heard 9 September 1982, it was continued and not heard until 20 September 1982, affording the plaintiff further opportunity to file affidavits. Also, the record reveals sufficient evidence that plaintiff had notice: (1) by the motion being calendared for 9 September 1982 and being continued; (2) by receiving notice from opposing counsel. There was no evidence of any objection by plaintiff's attorney. We do not find that plaintiff's attorney was surprised by the hearing of the motion nor do we find plaintiff's actions excusable.

[5] Plaintiff contends that the court erred in denying the motion to set aside the judgment where discovery was still pending when the summary judgment motion was granted. "Ordinarily it is

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error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979). The trial court is not barred in every case from granting summary judgment before discovery is completed. *Joyner v. Hospital*, 38 N.C. App. 720, 248 S.E. 2d 881 (1978). The decision to grant or deny a continuance [of discovery proceedings] is solely within the discretion of the trial judge, and his decision will not be reviewed absent a manifest abuse of discretion. *Manhattan Life Ins. Co. v. Miller Machine Co.*, 60 N.C. App. 155, 298 S.E. 2d 190 (1982), *cert. denied*, 307 N.C. 697, 301 S.E. 2d 389 (1983). At the time summary judgment was granted, discovery had been in progress for at least six months. The trial judge concluded that the defendants were answering the plaintiff's interrogatories in good faith and declined to enact sanctions against the defendants. Plaintiff had ample time to gain useful information from the discovery proceedings and only after plaintiff had received notice of the summary judgment motions were new interrogatories filed. The trial court ruled as a matter of law that no genuine issue of a material fact existed, thus no useful information could have been gained through discovery. The rule that summary judgment should not be granted while discovery is pending, presupposes that any information gleaned will be useful. *Manhattan Life, supra*, at 159, 298 S.E. 2d at 193. In light of these facts, the trial court was correct in its granting of summary judgment before discovery was complete and we find no abuse of discretion.

[6] Plaintiff's final contention is that the court abused its discretion by not granting relief pursuant to 60(b)(6) when neither the court nor counsel raised the issue of whether the plaintiff had procured a ready, willing, and able buyer. "While Rule 60(b)(6) has been described as 'a grand reservoir of equitable power to do justice in a particular case,' (citation omitted), it should not be 'catch-all' rule." (Citation omitted.) Courts have the power to vacate judgments when such is appropriate, yet they should not do so under Rule 60(b)(6) except in extraordinary circumstances and after a showing that justice demands it. *Equipment Co. v. Albertson*, 35 N.C. App. 144, 240 S.E. 2d 499 (1978). Plaintiff was not prevented from raising the issue of whether a ready, willing

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and able buyer was procured. It is not the duty of the trial court to raise issues and litigate cases for parties. Plaintiff failed to raise the issue at the hearing on the motion and cannot now argue that as an extraordinary reason to obtain relief under Rule 60(b)(6).

A motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure is addressed to the sound discretion of the trial court and its decision is not reviewable on appeal absent a showing of abuse of its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). We have reviewed the entire record and fail to find any abuse of discretion.

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CRAWFORD DREW REBER

No. 8423SC93

(Filed 6 November 1984)

Parent and Child § 2.2— felonious child abuse—insufficient evidence

The State's evidence was insufficient to support defendant's conviction of felonious child abuse in violation of G.S. 14-318.4 where it tended to show only that the child's health had been seriously impaired by an injury of some kind but did not tend to show that the injury was inflicted by defendant or that defendant inflicted the injury intentionally.

APPEAL by defendant from *Collier, Judge*. Judgment entered 11 May 1983 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 27 September 1984.

Defendant was tried for and convicted of felonious child abuse in violation of G.S. 14-318.4. The child allegedly abused was his three and a half month old daughter, Tiffany. Both the State and the defendant presented evidence, which was to the following effect:

Defendant married Tami Wolf Reber in 1975 and they had two children, Tabitha, born in 1979, and Tiffany, born 13 Feb-

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ruary 1982, and lived with the children in Alleghany County at the times involved. Although the child, Tiffany, looked fine at birth, during the next three months she had several illnesses, including a virus, several episodes of erratic, labored breathing, followed by lethargy or unresponsiveness for an hour or so, and periodic rashes on different parts of the body. She often vomited when fed. Bathing often made the child lethargic and unresponsive; and she often had trouble breathing. One night when the child was six to eight weeks old, she had a very hard time breathing immediately after being bathed; and for an hour and a half or so thereafter she just laid with a dead stare in her eyes, like she just wanted to sleep, and her only response to Mrs. Reber's attempts to arouse her was a low, moaning, hypertonic cry. The next morning, alarmed at the child's condition, Mrs. Reber took her to the family physician, Dr. Cahn.

Sunday morning, May 30, 1982, Mrs. Reber dressed and nursed the child about 9 o'clock, and about 9:30 left the child with defendant and went next door to use a neighbor's telephone. When Mrs. Reber left the child appeared to be fine. When she returned about ten minutes later, the defendant and the other child were in the carport washing windows where he could see the crib. Defendant told Mrs. Reber that Tiffany had a choking spell. Mrs. Reber ran into the house and found the baby lying on her stomach, very sleepy, and breathing very erratically; one of her eyes was straight and the other sort of veered off, and she cried in the same sick, hypertonic way that she did when she was between six and eight weeks old. Mrs. Reber picked up the baby and looked into her eyes, trying to arouse her and get her to respond. She did not see defendant do anything to the child except hold her up and move her about when they were trying to get her to respond. She, herself, also held the child up and tried to bounce her to make her start breathing and open her eyes. After about five minutes of this, without the child improving, Mrs. Reber asked their neighbor to take her and Tiffany to the Alleghany Memorial Hospital about five minutes away. Defendant stayed home with the other child for awhile, but went to the hospital later. On the way to the hospital, Mrs. Reber alternately gave the baby mouth-to-mouth resuscitation, and picked her up under the arms, not supporting her head, and shook her. When they got to the hospital the baby was limp, pale, and breathing very shallow-

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ly, if at all. When Dr. Cahn saw Tiffany, her skin was blue, he couldn't tell whether she was breathing or not, and she responded only to painful stimulation. Her temperature was four degrees below normal and they did blood tests and warmed her. Three hours later they transported her to North Carolina Baptist Hospital in Winston-Salem. Dr. Cahn, Mrs. Reber, and an ambulance attendant rode in the ambulance with the baby, who was placed in an infant transfer isolette that provided her with warmth and oxygen. Every minute or so, to arouse the child and make her breathe, Dr. Cahn shook the child's hand or foot.

At Baptist Hospital Tiffany was attended by Dr. Sara Sinal, who observed and treated her from the day after admission until her release on 1 July 1982. When Dr. Sinal saw Tiffany for the first time she was semiconscious, responding only to painful stimuli. For about a week or so Tiffany had intermittent epileptic-type jerking motions of the arms and legs associated with periods of lethargy, called postictal periods. Dr. Sinal asked Dr. Richard Weaver, an ophthalmologist, to evaluate the child and he noted that blood vessels in the retina were ruptured and blood was in the vitreous, a jelly-like substance filling the inside of the eyeball, which he felt was probably due to increased inter-cranial pressure. He admitted that he had no way of knowing how long the blood had been there. The presence of a sub-arachnoid hemorrhage was confirmed by CAT scans taken May 30, June 6 and June 23.

Dr. Sinal testified that: Trauma of some kind most likely caused the hemorrhage, but upon examining Tiffany's head she found no external evidence of trauma. Either a very diffused blow or a severe shaking injury can produce such an effect without external trauma; but she had no history to document either a blow or a shaking as the cause of injury. This type of injury is peculiar to babies under six months of age, because the strap muscles that give head control are not well developed and there is more flexibility in the skull for the brain to bounce around inside. She had no information from talking with the parents that they shook the baby and no history to document either a blow or a shaking as a cause of the injury. She did not see how the baby could have caused the injury to herself without there being some history of a fall from a great height. She had heard of a fall from a couch, but did not think it would have caused this injury. She was of the

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opinion that Tiffany was a victim of the battered child syndrome, which she defined as the symptoms a child has when it receives an injury either from the parent or by neglect, and that the injury was not accidental, since the parents gave no history of an accidental injury.

Attorney General Edmisten, by Associate Attorney General Debra K. Gilchrist, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

PHILLIPS, Judge.

The sole question raised by this appeal is whether all the evidence presented at trial was sufficient to establish defendant's guilt of the offense charged. The State mistakenly contends that this question is not properly before us because defendant, after moving to dismiss at the end of the State's case, introduced evidence and did not "renew" his motion to dismiss at the end of all the evidence. Since this same contention has been made in several other criminal appeals recently, we point out that a defendant's failure to either "renew" his motion at the end of the evidence, or even make a motion to dismiss for the first time, does not affect his right to contend on appeal that the evidence presented by both parties was insufficient to warrant his conviction. First of all, a motion to dismiss made at the end of the State's evidence cannot be "renewed," as that word is usually understood, after the defendant has put on evidence; and using that misnomer tends to confuse a matter that is really quite simple when the statutes are examined. For as G.S. 15-173 makes crystal clear, the right that a defendant in a criminal case has to test the sufficiency of *just* the State's evidence, under a motion for nonsuit or dismissal made at the end of the State's evidence, is lost for good and all, never to be revived by any motion whatever, when he puts on evidence, and any motion made thereafter tests all the evidence, rather than just the State's. And as G.S. 15A-1227(d) and G.S. 15A-1446(d)(5) make equally clear, in appealing a criminal case a defendant has a right to question the sufficiency of all the evidence to convict him, even though no motion to dismiss was either made or "renewed" during the entire course of the trial. Since this defendant properly assigned as error the court's failure

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to dismiss the case at the close of all the evidence because the evidence presented was insufficient to convict him of the crime charged, he is entitled to our judgment with respect thereto.

To validly convict the defendant under the indictment lodged against him, the State had to prove that he intentionally inflicted a serious injury on the three and a half month old child, which resulted in the substantial impairment of the child's physical health. G.S. 14-318.4. The only element of the offense that the evidence presented tends to establish is that the child's health has been seriously impaired by an injury of some kind; it does not tend to show that the injury received by the child was inflicted by the defendant or that he inflicted such injury intentionally. *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983). Nor is this gap in the evidence filled by the rather extensive opinion testimony of Dr. Sinal, which we accept at face value, in its most favorable light for the State, as the law governing appeals of this type requires. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Because even if the child had all the signs and symptoms of an abused child and it was proper to infer therefrom, as Dr. Sinal opined, that the child had not been injured accidentally, but intentionally, it cannot be inferred from that inference that defendant is the one who injured the child and did so intentionally. The State's argument that the child's good condition when Mrs. Reber left to use the neighbor's telephone and its bad condition a few minutes later established that defendant injured the child, since he was the only adult there, is without merit. If the injury had been a broken bone that was sound ten minutes earlier, the argument would be persuasive. But the injury in this instance, to blood vessels deep in the skull, was invisible, and the evidence does not show when or how it occurred. None of the doctors, including Dr. Sinal, expressed the opinion that the injury that caused the hemorrhaging of the blood vessels happened during the brief interval while Mrs. Reber was gone, or even that Sunday. The possible time of the hemorrhaging was alluded to only by Dr. Weaver, who testified that he had no way of knowing how long the blood in the eyes, which came from the injured brain, had been there. And though Dr. Sinal expressed the opinion that the injury may have resulted from a violent shaking of the child, there was no evidence that defendant had ever shaken the child, violently or otherwise. Furthermore, as Dr. Weaver testified,

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"[t]here are many causes of increased intercranial pressure," which can result in the condition that the child was in. Thus, the verdict that defendant intentionally injured the child that Sunday morning was based on speculation and conjecture, not evidence, and cannot stand. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973).

We therefore vacate the judgment of conviction and direct that a judgment of acquittal be entered.

Vacated and remanded.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. WILLIE ACKLIN

No. 832SC1154

(Filed 6 November 1984)

1. Criminal Law §§ 181, 105.1— sufficiency of the evidence—raised for first time in motion for appropriate relief

In a criminal case, the proper motion to test the sufficiency of the State's evidence is a motion to dismiss the action; however, a defendant who fails to make the motion at trial is permitted to raise the challenge in a motion for appropriate relief. G.S. 15A-1414.

2. Automobiles and Other Vehicles § 131.1— hit and run—evidence sufficient

In a prosecution for hit and run and failing to stop at a stop sign, the trial court properly denied defendant's motion for appropriate relief based on insufficient evidence where the evidence, taken in the light most favorable to the State, showed that the victim was struck by a trailer loaded with firewood as defendant drove from an alley; that one of the wheels of the trailer dislodged as defendant turned into the street, slowing the truck; that defendant drove up the street, crossed some railroad tracks, and drove back past the point where the accident occurred; and that defendant failed to stop at a stop sign as he left the scene of the accident. G.S. 20-166, G.S. 15A-1414(1)(c).

3. Criminal Law § 132— denial of motion to set aside verdict as contrary to the weight of the evidence—no abuse of discretion

There was no abuse of discretion in the trial court's denial of defendant's motion for appropriate relief on the grounds that the verdict was contrary to the weight of the evidence.

Judge PHILLIPS dissenting.

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APPEAL by defendant from *Brown, Judge*. Judgment entered 2 June 1983 in Superior Court, MARTIN County. Heard in the Court of Appeals 21 August 1984.

The defendant was charged with hit and run involving personal injury and failure to stop at a stop sign. The jury returned a verdict of guilty on both charges and the court imposed an active sentence. After judgment, defendant made a motion for appropriate relief under the provisions of 15A-1414(b)(1)(a) and (c) and 15A-1414(b)(2). From a denial of his motion, defendant appeals, assigning error only as to his conviction to the hit and run offense.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Michael Rivers Morgan, for the State.

Thomas B. Brandon, III, for defendant appellant.

JOHNSON, Judge.

The State offered evidence which tends to show the following: On 21 January 1983, defendant, Willie Acklin, came out of Knox Hardware Company in Robersonville, North Carolina and into a public alley where he had parked his truck and an attached trailer loaded with firewood. The defendant had cut the firewood for another individual and had attempted to sell the firewood to Knox Hardware. Upon nearing his truck, defendant was met by David Earl Whitehurst who asked defendant if he could repay approximately eighty dollars he owed Mr. Whitehurst. The amount owed was for work which Mr. Whitehurst had performed on defendant's trailer. The defendant told Mr. Whitehurst he could not repay him anything at that time, but after a brief discussion, Mr. Whitehurst thought the defendant agreed to let him hold the trailer and firewood as security for the debt.

The two men proceeded to the driver's side of defendant's truck. Mr. Whitehurst continued on to the rear of the truck as defendant got into the truck, cranked it and began to drive off. Mr. Whitehurst then ran back to the truck cab and tried to open the door, whereupon Mr. Whitehurst's hand became stuck in the door latch while defendant's truck moved forward. As the defendant neared the street at the end of the alley, Mr. Whitehurst was running alongside the truck with his hand still lodged in the door.

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At the sidewalk, Mr. Whitehurst freed himself from the door and as he cleared the truck and trailer, he fell or tripped and was hit by the trailer loaded with firewood.

As the defendant exited the alley turning left onto the street, one of the wheels dislodged from the trailer slowing the speed of the truck. The defendant continued up the street towards the railroad tracks which divided the street. Defendant crossed the track and then turned right and drove on the opposite side of the street back past the point where the accident occurred. As he drove past, defendant looked back toward where the accident occurred and where Mr. Whitehurst lay injured near the sidewalk. Mr. Whitehurst's brother was seated in an automobile parked nearby at the time of the accident. Immediately after the accident, Mr. Whitehurst's brother exited the automobile, examined Mr. Whitehurst and then ran down the street to stop the defendant as he was driving back by. Defendant failed to stop and Mr. Whitehurst's brother threw rocks at defendant's truck, shattering the rear window. Mr. Whitehurst, the victim, testified he never assaulted defendant. The State offered further evidence tending to show that defendant failed to stop for a duly erected stop sign as he left the scene of the accident.

Defendant testified that he was not aware that his trailer had hit Mr. Whitehurst and that his fear of being assaulted by Mr. Whitehurst and his brother was the reason for his failure to stop.

The sole question presented by defendant's appeal is whether the trial court erred in denying defendant's motion for appropriate relief made pursuant to G.S. 15A-1414(b)(1)(a) and (c) and (b)(2). Defendant's motion is based upon two contentions: (1) the evidence was insufficient to be submitted to the jury and (2) that the verdict is contrary to the weight of the evidence.

[1] "In a criminal case the proper motion to test the sufficiency of the State's evidence is a motion to dismiss the action or a motion for judgment as in the case of nonsuit." *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Chavis*, 30 N.C. App. 75, 77, 226 S.E. 2d 389, 391, *cert. denied*, 290 N.C. 778, 229 S.E. 2d 33 (1976). Although defendant failed to make the motion at trial challenging the sufficiency of the evidence, defendant is permit-

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ted to raise such challenge in a motion for appropriate relief. G.S. 15A-1414.

[2] As previously noted, defendant's assignment of error on appeal seeks to challenge only the sufficiency of the evidence regarding the hit and run conviction.

The State had the burden of presenting sufficient evidence on each and every element of the offense of hit and run with personal injury to warrant submitting its case to the jury. The essential elements are: (1) that the defendant was involved in an accident; (2) that someone was physically injured in this accident; (3) that at the time of the accident the defendant was driving the vehicle; (4) that the defendant knew that he had struck a pedestrian and that the pedestrian suffered physical injury; (5) that the defendant did not stop his vehicle immediately at the scene of the accident; and (6) that the defendant's failure to stop was wilful, that is, intentional and without justification or excuse. G.S. 20-166. Defendant's contention that there was insufficient evidence to warrant submitting the case to the jury centers around element four, his knowledge that he had struck Mr. Whitehurst and element six, that his failure to stop was not justified or excused. Defendant argues that the evidence shows that he was unaware that his trailer had hit Mr. Whitehurst, thereby negating the fourth element; and that his evidence shows that his failure to stop was due to his fear of being assaulted by Mr. Whitehurst and his brother, thereby negating the sixth element. It is a well settled principle of law that:

In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. (Citation omitted.) In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve. *Id.* The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. *Id.* The defendant's evidence, unless favorable to the State, is not to be taken into consideration. (Citations omitted.) However, when not in conflict with the State's evidence, it may be used to explain or clarify the evidence, offered by the State. *Id.* In ruling on the motion,

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evidence favorable to the State is to be considered as a whole in determining its sufficiency. (Citation omitted.)

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E. 2d 649, 652-653 (1982).

Applying the foregoing principles to the evidence in the case at bar, we hold that the trial court properly denied defendant's motion for appropriate relief made pursuant to G.S. 15A-1414(1)(c).

[3] The defendant's second contention is that the jury verdict is contrary to the weight of the evidence. A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge and is not reviewable on appeal in absence of abuse of that discretion. *State v. Boykin*, 298 N.C. 687, 702, 259 S.E. 2d 883, 892 (1979), *cert. denied*, 446 U.S. 911, 100 S.Ct. 1841, 64 L.E. 2d 264 (1980). Disposition of post-trial motions is within the discretion of the trial court and the refusal to grant them is not error absent a showing of abuse of that discretion. *State v. Watkins*, 45 N.C. App. 661, 665, 263 S.E. 2d 846, 849, *rev. denied*, 300 N.C. 561, 270 S.E. 2d 115 (1980). We have reviewed the entire record and the record discloses no abuse of discretion by the trial judge. This contention is without merit.

The trial court properly denied defendant's motion for appropriate relief.

Affirmed.

Judge WEBB concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In its brief the State accepted and adopted the defendant's statement of the facts, which states that as defendant was leaving the alley, the victim's brother threw rocks at defendant's truck, and that defendant "next proceeded to the Robersonville Police Station approximately one block from the scene of the alley where he reported the incident to the police." This shows, I think, the defendant's failure to stop his vehicle was justified and ex-

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cusable, since staying at the scene would have likely led to further violence. Furthermore, the statute he was prosecuted under, G.S. 20-166(a), expressly permits a driver to leave an accident scene for the purpose of calling the law, and defendant's trip to the nearby police station was within that authority, it seems to me.

DONALD WAYNE STANLEY AND SOUTH CAROLINA INSURANCE COMPANY v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 8316SC1181

(Filed 6 November 1984)

1. Appeal and Error § 45— form of arguments in brief

Appellant violated App. Rule 28(b)(5) by failing to set out its argument in its brief in the form of questions immediately followed by a reference to the assignments of error and exceptions pertinent to the questions.

2. Insurance § 87.2— automobile liability insurance—lawful possession of vehicle—false representation concerning driver's license

A driver who obtained possession of an automobile from the owner by falsely representing that he had a valid driver's license was in "lawful possession" of the vehicle within the meaning of G.S. 20-279.21 so that his operation of the vehicle was covered by the owner's automobile liability policy.

APPEAL by defendant, Nationwide Mutual Insurance Company, from *McKinnon, Judge*. Judgment entered 15 September 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 30 August 1984.

This is a civil action in which plaintiffs, South Carolina Insurance Company (South Carolina) and David Wayne Stanley, seek to require defendant, Nationwide Mutual Insurance Company (Nationwide), to pay a judgment pursuant to its automobile liability insurance coverage extended to Mitchell and Teresa Jacobs.

The essential facts are:

Mitchell and Teresa Jacobs owned a 1974 AMC Matador automobile which was insured by Nationwide. On 2 May 1979, Wayne Jacobs, Mitchell Jacobs' brother, sought to borrow the automobile

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in question. Mitchell Jacobs asked Wayne if he had a driver's license. Wayne produced a North Carolina identification card, asserting to Mitchell Jacobs that he had a valid driver's license. The North Carolina identification card is similar in appearance to a driver's license.

Mitchell Jacobs knew that his brother's driver's license previously had been revoked, but believed the identification card was a driver's license and as a result, gave him the keys to the automobile.

Later that same day, Wayne Jacobs was operating the borrowed automobile in Lumberton when he was involved in a collision with an automobile owned and operated by plaintiff Stanley. Stanley suffered bodily injury and property damage as a result of the collision. In a prior action, Stanley sued Wayne, Mitchell and Teresa Jacobs recovering on 13 March 1980 a judgment for \$20,000 plus interest from Wayne Jacobs only.

Nationwide defended this prior action under a non-waiver agreement and refused to pay the judgment entered against Wayne Jacobs. South Carolina paid Stanley \$16,375 in settlement of his claim for damages under its uninsured motorist's policy issued to him.

On 12 February 1982, Stanley and South Carolina filed this action against Nationwide to require it to pay the \$20,000 judgment entered against Wayne Jacobs under its automobile liability policy issued to Mitchell and Teresa Jacobs.

Nationwide moved for directed verdict at the close of plaintiff's evidence and at the close of all evidence. The jury returned the following verdicts:

(1) At the time of the accident on 2 May 1979 was Wayne Jacobs operating the 1974 AMC Matador automobile owned by Mitchell and Teresa Jacobs with the permission of its owners, or either of them?

Answer: No

(2) At the time of the accident on 2 May 1979 was Wayne Jacobs in lawful possession of the 1974 AMC Matador automobile owned by Mitchell and Teresa Jacobs?

Answer: Yes

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Judgment was entered against Nationwide for \$15,000 plus interest which was ordered paid to South Carolina in subrogation of Stanley's rights. Nationwide appeals, Stanley does not participate in this appeal and South Carolina is now the real party in interest.

Bruce W. Huggins, for plaintiff-appellee South Carolina Insurance Company.

I. Murchison Biggs, for defendant-appellant Nationwide Mutual Insurance Company.

EAGLES, Judge.

[1] Appellant Nationwide has violated Rule 28(b)(5), Rules of Appellate Procedure in that it failed to set out its argument in its brief in the form of questions immediately followed by a reference to the assignments of error and exceptions pertinent to the questions. By application of Rule 28, Nationwide has abandoned its entire appeal. However, due to the serious questions presented on appeal and the brevity of the record, we are persuaded, in the interest of justice and in our discretion, as permitted by Rule 2, Rules of Appellate Procedure, to waive the error under Rule 28.

Defendant assigns as error the trial court's refusal to allow its motions for directed verdict and to have the verdict set aside. We find no error.

On appeal from an order granting or denying a directed verdict, we must determine the sufficiency of the evidence based upon the same standards as those applied by the trial judge. *Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E. 2d 222 (1971).

A motion for directed verdict raises the question as to whether there is sufficient evidence to go to the jury. The test that the trial court must use is whether plaintiff's evidence, taken as true and in the light most favorable to the plaintiff is insufficient as a matter of law to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Applying this test to the evidence submitted by plaintiffs at trial, it is clear from the record that the evidence was sufficient to go to the jury.

[2] Nationwide argues that where a person obtains from another the possession of an automobile by falsely representing that he is

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a licensed driver, that the possession so obtained is not "lawful possession" within the meaning of G.S. 20-279.21. We disagree.

G.S. 20-279.21(b)(2) states, in pertinent part:

[An] owner's policy of liability insurance . . . shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or *any other persons in lawful possession*, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles. [Emphasis added.]

Nationwide urges that one cannot have lawful possession without permission and that by falsely representing to Mitchell Jacobs that he had a valid driver's license, Wayne Jacobs did not have permission and as a result, no lawful possession, of the 1974 AMC Matador automobile. The case law in North Carolina is to the contrary.

Nationwide relies strongly on *Jernigan v. State Farm Mutual Automobile Insurance Company*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972) for a proposition stated in dictum that permission is an essential element of lawful possession. We have expressly rejected the proposition that "permission" is necessary for "lawful possession" in *Packer v. Traveler's Insurance Company*, 28 N.C. App. 365, 221 S.E. 2d 707 (1976), where we held that:

[F]ailure of plaintiff to offer evidence of permission to drive on the very trip and occasion of the collision is not fatal to plaintiff's case. Plaintiff's evidence was sufficient to justify a verdict finding that [the driver] was in lawful possession of the insured's vehicle at the time of the collision. 28 N.C. App. at 368, 221 S.E. 2d at 709.

The evidence is clear that Mitchell Jacobs did not give Wayne Jacobs permission to drive without a valid driver's license, and the jury so answered the issue of permission.

It is also clear that Mitchell Jacobs was a lawful owner of the 1974 AMC Matador automobile and could give lawful possession of the automobile to Wayne Jacobs. The jury found from these facts that the possession was lawful. We agree. It seems clear to

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us that when lawful possession has been shown, further proof is not required that the operator had permission to drive on the very trip and occasion of the collision. See, *Insurance Co. v. Broughton*, 283 N.C. 309, 196 S.E. 2d 243 (1973), where the addition to G.S. 20-279.21(b)(2) of "any other persons in lawful possession" is briefly discussed.

To place a burden of proving "permission" on plaintiff as well as "lawful possession" is a burden heavier than the legislature intended in G.S. 20-279.21(b)(2).

For these reasons we find no error. Defendant's other arguments are without merit.

Affirmed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. ROBERT HAL BRAME

No. 8414SC88

(Filed 6 November 1984)

1. Escape § 8— escape from county jail officers—insufficient evidence

The State's evidence was insufficient to support defendant's conviction of escape from a county jail or an officer of such facility in violation of G.S. 14-256 where it tended to show that defendant was confined in the Durham County Jail, that Orange County officers took defendant into their custody to transport him to Orange County for trial, and that defendant escaped from the officers' car while still in Durham County, since there was no evidence that defendant escaped from the Durham County Jail or from the lawful custody of an officer of such jail.

2. Kidnapping § 1.2— confining to hold as hostage—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of kidnapping a deputy sheriff under the theory that defendant confined, restrained and removed the deputy for the purpose of holding him as a hostage where it tended to show that the victim and another deputy were transporting defendant from one county to another for trial; defendant placed a gun to the victim's head and stated that he wanted to get away; when the occupants of the police vehicle became aware that they were being followed by a red truck, defendant ordered the victim to stop the vehicle and ordered the other deputy to tell the driver of the truck that defendant would kill the vic-

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tim if the truck driver persisted in following the police vehicle; when the other officer left the police vehicle, defendant ordered the victim to "go," and the victim and defendant immediately left the scene; and defendant eventually forced the victim from the vehicle.

3. Kidnapping § 1.3— failure to give requested instructions

The trial court in a kidnapping case did not err in refusing to give defendant's requested instruction that the State had to prove that the restraint or removal from one place to another was not an inherent, inevitable feature of such other crime that was being committed; nor did the trial court err in failing to give a requested instruction defining removal from one place to another and restraint.

4. Criminal Law § 138— aggravating factor—inducing participation by another—insufficient evidence

The evidence did not support the trial court's finding as an aggravating factor in sentencing defendant for kidnapping that defendant induced a female who had no prior criminal record to participate in the commission of the offense.

APPEAL by defendant from *Hobgood (Robert H.)*, Judge. Judgments entered 21 September 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 September 1984.

Defendant was charged in proper bills of indictment with kidnapping, two counts of assault with a deadly weapon on a law enforcement officer and felonious escape. Defendant was found guilty of second degree kidnapping, two counts of assault with a deadly weapon on a law enforcement officer and misdemeanor escape. From judgments imposing a fifteen-year prison term for second degree kidnapping, two concurrent two-year terms for assault with a deadly weapon on a law enforcement officer and a one-year term for misdemeanor escape, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant, appellant.

HEDRICK, Judge.

[1] Defendant assigns error to the denial of his motion to dismiss the case wherein he was charged with escape. The evidence with respect to this charge, when considered in the light most favorable to the State, tends to show that Orange County Deputy

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Sheriffs Charles Blackwood and Phyllis Coates took the defendant into their custody at the Durham County Jail for the purpose of transporting him to Orange County for trial. The defendant was handcuffed and placed in the back seat of the officers' automobile. While still in Durham County the defendant used a key secreted upon his person to unlock his handcuffs to effect his escape. He then placed the barrel of a twenty-five caliber pistol into Officer Blackwood's ear and forced him to drive the car along a circuitous route. Defendant eventually forced Blackwood from the vehicle and drove to a location at which he had arranged to meet his girlfriend.

Defendant was tried on a bill of indictment that charged him with violating N.C. Gen. Stat. Sec. 14-256, which in pertinent part provides:

If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a misdemeanor.

. . .

In *State v. Brown*, 82 N.C. 585 (1880), our Supreme Court held that this statute applied only "to the act of breaking out the jail or county prison and not from mere personal restraint or imprisonment under law." *Id.* at 588.

The evidence in the present case tends to show only that the defendant escaped from Orange County Sheriff's deputies. There is no evidence in this record from which the jury could find beyond a reasonable doubt that the defendant escaped from the Durham County Jail, or from "the lawful custody of any superintendent, guard or officer of such . . . jail." (Emphasis added.) Under the circumstances of this case, wherein the defendant was clearly charged with violating N.C. Gen. Stat. Sec. 14-256, we hold the evidence is at variance with the charge, and the court erred in denying defendant's motion to dismiss.

[2] Defendant next assigns as error the denial of his motion to dismiss the charge of kidnapping Charles Blackwood. He argues there is not sufficient evidence to support the verdict and the judgment in this case.

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The evidence, when considered in the light most favorable to the State, with regard to the charge of kidnapping Charles Blackwood tends to show the following: After defendant placed a gun to Deputy Blackwood's head, he told the officer, "I want to get away. If I don't I will kill you." Soon thereafter, the occupants of the car became aware that they were being followed by a red Toyota truck. After efforts to "lose" the truck were unsuccessful, defendant ordered Deputy Blackwood to stop the car. Defendant then ordered Deputy Coates to get out of the car and to deliver a message to the driver of the truck, the message being that defendant would kill Deputy Blackwood if the driver of the truck persisted in following the police vehicle. As soon as Deputy Coates left the car, defendant ordered Deputy Blackwood to "go," and the officer and the defendant immediately left the scene. After several turns defendant directed the deputy to stop the car, telling him, "I want you to get out and run. Don't look back. If you do, I will kill you." Deputy Blackwood complied with the defendant's instructions.

N.C. Gen. Stat. Sec. 14-39, the statute under which defendant was charged with kidnapping Blackwood, in pertinent part provides:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony;

The evidence is clearly sufficient to permit the jury to find beyond a reasonable doubt that the defendant "confine[d], restrain[ed], or remove[d] from one place to another" Deputy Blackwood, and that "such confinement, restraint or removal" was for the purpose of holding the officer as a hostage and for the purpose of facilitating flight following the commission of a felony. This assignment of error has no merit.

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[3] By Assignment of Error No. 7, defendant contends the court failed to apply and explain the law arising on the evidence in the case wherein defendant was charged with second degree kidnapping. This assignment of error purports to be based on two exceptions. Exception No. 6C relates to the court's ruling at the instruction conference denying defendant's request for the following instruction:

The State must prove to you and beyond a reasonable doubt that restraint or removal from one place to another place was not an inherent, inevitable feature of such other crime that was being committed.

Exception No. 6A refers to the court's ruling, after instructions had been given, denying defendant's request for "some definition . . . on removal from one place to another and restraint . . . in accord with *State vs. Erwin*, and *State vs. Fulcher*." We have carefully reviewed the court's instructions to the jury in light of this assignment of error and the exceptions on which it is based, and find no prejudicial error in the instruction as given.

In Case Nos. 83CRS3932 and 83CRS3933, wherein defendant was charged with two counts of assault with a deadly weapon on a law enforcement officer, defendant has brought forward and argued no assignment of error, and we find no error.

[4] Finally, defendant contends the trial court erred in sentencing him to a term exceeding the presumptive term in the case wherein defendant was charged with and convicted of second degree kidnapping. The trial court found four aggravating factors and no mitigating factors and, upon concluding that the aggravating factors outweighed the mitigating factors, imposed a prison sentence of fifteen years, a term exceeding the presumptive sentence of nine years. Defendant contends the trial court erred in finding the following aggravating factors:

1. The defendant induced Carol Yates who participated in the commission of the offense; a female who had no prior criminal record.

4. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

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5. The offense was committed against a present or former law enforcement officer.

9. The defendant was armed with or used a deadly weapon at the time of the crime.

Defendant contends that the first factor found by the trial court, relating to Carol Yates' participation in the commission of the offense, is unsupported by the evidence in the record. We agree. The record is devoid of any evidence showing that Ms. Yates participated in any way in or had any knowledge of defendant's actions in kidnapping Officer Blackwood. The trial court's error in finding this factor in aggravation requires that the case be remanded for resentencing. It is thus unnecessary for us to discuss defendant's remaining assignments of error relating to sentencing.

The result is: In Case No. 83CRS3934, wherein defendant was charged with and convicted of escape, the judgment is vacated; in Case Nos. 83CRS3932 and 83CRS3933, wherein defendant was charged with and convicted of assault with a deadly weapon on a law enforcement officer, the judgments are affirmed; in Case No. 83CRS3930, wherein defendant was charged with and convicted of second degree kidnapping, we find no error but remand the case for resentencing.

Vacated in part, affirmed in part, no error in part and remanded for resentencing.

Judges BECTON and PHILLIPS concur.

ZELMA PERKINS v. BROUGHTON HOSPITAL

No. 8310IC1310

(Filed 6 November 1984)

1. Master and Servant §§ 69, 93— workers' compensation—refusal to accept further treatment—absence of order by Industrial Commission

Plaintiff was not barred from receiving further workers' compensation benefits because of her refusal to undergo a myelogram which defendant employer's doctor had recommended where the Industrial Commission had not

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ordered her to undergo a myelogram. An Industrial Commission letter permitting defendant to stop compensation payments "until plaintiff accepts further treatment" did not constitute an order directing plaintiff to undergo the myelogram.

2. Master and Servant § 94.2— workers' compensation—continuation of temporary total disability—expert testimony not required

Expert testimony was not required for the Industrial Commission to find that plaintiff still suffers from temporary total disability from a back injury; rather, such finding was supported by plaintiff's testimony that she is able to get around only on crutches, she still has trouble getting out of bed, still has pain running down the back of both legs, and still is able to stay up only about four hours at a time without having to sit or lie down.

APPEAL by defendant from Opinion and Award of the North Carolina Industrial Commission entered 12 September 1983. Heard in the Court of Appeals 27 September 1984.

In this proceeding for workers' compensation defendant admitted that plaintiff sustained a compensable back injury and made disability payments to her for twelve weeks. At that time, dissatisfied with plaintiff's recovery and the failure of plaintiff's doctor, a family practitioner, to fully report on plaintiff's condition, defendant had her examined by its orthopedist, who recommended that she submit to a myelogram. Plaintiff, being of the opinion that the doctor had been both rude and rough during the examination, refused to accept the recommendation. Defendant then applied to the Industrial Commission on its standard form for permission to stop the payments; the ground stated therefor, without any amplification or explanation, was "that employee refuses to accept further treatment." On 19 April 1982, the Industrial Commission responded to defendant's application with a form letter that advised defendant only: "You may stop the payment until plaintiff accepts further treatment." A copy of the letter was sent to plaintiff. Meanwhile, on her own initiative, plaintiff had been examined by another specialist, who recommended that she undergo a hospital work-up; but upon the doctor contacting defendant about it, he was told that defendant would not pay therefor and the work-up was not done. On 1 November 1982, a hearing was held to determine only, so the parties stipulated, "whether or not plaintiff refused medical treatment and were temporary total disability payments due between April 19, 1982 and the date of this hearing." At the same time it was also

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ordered, with the parties' agreement, that plaintiff would be examined by the doctor she had consulted about a work-up several months earlier, and that "plaintiff's temporary total disability payments would be resumed as of November 1, 1982." Following the hearing Commissioner Vance found that "plaintiff did not refuse treatment as alleged" and was still totally disabled and thus entitled to compensation for the period involved. From an Opinion and Award based thereon defendant appealed to the Full Commission, and when that body adopted and affirmed the Opinion and Award of Commissioner Vance, defendant then appealed to this Court.

No brief filed for plaintiff appellee.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for defendant appellant.

PHILLIPS, Judge.

This appeal has no business being here for two reasons. First, it is dismissable as a fragmentary and premature appeal from an interlocutory order that concerns only an interim period of disability and leaves unlitigated the other issues in the case. G.S. 7A-29; *Vaughn v. North Carolina Dept. of Human Resources*, 37 N.C. App. 86, 245 S.E. 2d 892 (1978), *aff'd*, 296 N.C. 683, 252 S.E. 2d 792 (1979). And, second, the appeal has no plausible legal or evidentiary basis. Rather than dismiss the appeal, however, we prefer to adjudicate the two contentions that defendant makes herein, as it would be unjust to require plaintiff to face them again later.

[1] The defendant's first contention is that under the provisions of G.S. 97-25 plaintiff is barred from receiving further benefits under the Act because she refused to undergo the myelogram that its doctor recommended. In pertinent part, G.S. 97-25 provides that "the refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure *when ordered* by the Industrial Commission shall bar said employee from further compensation." (Emphasis supplied.) Thus, it is quite plain that though an employee's refusal to accept prescribed medical treatment can bar the employee from further compensation, it does so only if the treatment has been *ordered*

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by the Industrial Commission. And in this case it is crystal clear that the Industrial Commission has not *ordered* plaintiff to do anything. To supply this deficiency defendant argues that its application for permission to stop the payments was tantamount to a motion for an order directing plaintiff to accept the recommended myelogram and that the Industrial Commission's letter permitting defendant to stop the payments "until plaintiff accepts further treatment" was tantamount to the order supposedly requested. But since the word myelogram does not appear in either the application or form letter, how could we possibly hold that these two papers between them somehow constituted an order directing plaintiff to submit to a myelogram? Orders requiring litigants to do specific things are not created by such indirection and substitution; they are created by courts and commissions issuing directives that explicitly inform parties what is required of them. And, in this instance, since defendant neither applied for nor obtained an order directing plaintiff to submit to a myelogram, but merely obtained permission to stop paying until plaintiff accepted "further treatment" of some undesignated nature and extent, no basis whatever exists for defendant's claim that plaintiff's rights to compensation were barred by her failure or refusal to accept the treatment involved. It is also clear, as the Commission found upon competent evidence, that plaintiff had not refused the recommended myelogram, though she knew myelograms were not without danger and admittedly did not want to undergo one unless necessary, but was merely in the process of obtaining a second opinion, which was both sensible and within her right, when defendant refused to pay for it.

[2] Defendant's other contention, that the Commission's finding that plaintiff is still temporarily and totally disabled is unsupported by the evidence because no expert testified to that effect, is of no more substance. Actually, the issue agreed to by the parties was not whether plaintiff was still disabled, but "were temporary total disability payments due between April 19, 1982, and the date of this hearing." Since defendant had already agreed to resume the payments that day, acknowledging thereby that plaintiff was still disabled, it would seem that the parties understood that plaintiff's condition was not then in issue and whether the payments were due depended entirely upon whether she had refused the treatment as alleged. Nevertheless, the Commission

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found that plaintiff was still disabled and there was evidence to that effect. Though nearly all of plaintiff's testimony was about the recommended myelogram, she also testified that though better than she was the first few weeks after the injury when she was able to get around only on crutches, she still had trouble getting out of bed, still had pain running down the back of both legs, and still was able to stay up only about four hours or so at a time without having to sit or lie down. This testimony was competent and adequately supports the finding made. While some human conditions can only be testified to by medical experts, the one involved in this case is not one of them. The ordinary person knows, without having to consult a medical expert, when it is necessary to lie down and rest because his or her own body is tired, exhausted, or in pain, and the law has no inhibition against testimony to that effect. The credibility and weight of plaintiff's testimony was for the Commission to decide, not us. *Crawford v. Central Bonded Warehouse*, 263 N.C. 826, 140 S.E. 2d 548 (1965). Furthermore, the determination that plaintiff is still disabled is also supported to some extent by the recommendation of defendant's doctor that she undergo a lumbar myelogram, since it is well known that responsible doctors do not make such recommendations to those whose backs are not significantly impaired.

Affirmed.

Judges HEDRICK and BECTON concur.

JOEL K. CUTCHIN v. THADDEQUES ARNELL PLEDGER, HARRISON B. BOWE, JR. (ADMINISTRATOR OF THE ESTATE OF DONNEY ELTON BOWE, DECEASED), AND JAMES ANDREW FRANCIS

No. 831SC1106

(Filed 6 November 1984)

Automobiles and Other Vehicles §§ 11.3, 50— insufficient evidence of negligence and proximate cause

In an action arising out of a collision involving four vehicles, plaintiff's forecast of evidence was insufficient to show any negligence by one defendant where it tended to show that such defendant was lawfully operating his vehicle in his own lane of travel when the collision occurred in the other lane;

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furthermore, plaintiff's forecast of evidence was insufficient to show that any negligence on the part of the second defendant was a proximate cause of plaintiff's injury where it tended to show that plaintiff struck the rear of a vehicle which had stalled in plaintiff's lane of travel, and that the stalled vehicle was knocked into the second defendant's automobile which was stopped with its lights on facing the stalled vehicle.

APPEAL by plaintiff from *Watts, Judge*. Judgments entered 18 May, 19 May and 28 June 1983 in Superior Court, DARE County. Heard in the Court of Appeals 23 August 1984.

This is a civil action arising out of an automobile collision in which plaintiff, Joel K. Cutchin, seeks damages from defendants Thaddeques Arnell Pledger, Harrison B. Bowe, Jr., Administrator of the Estate of Donney Elton Bowe (Deceased) and James Andrew Francis allegedly as a result of their negligence.

Sometime after midnight on 11 July 1981, plaintiff was operating his automobile in a westerly direction on the Wright Memorial Bridge (U.S. Route 158) in Currituck County. The Wright Memorial Bridge is an approximately 2½ mile long, two-lane highway bridge running in a generally east to west direction.

At some point on the bridge, near the "high rise," plaintiff first noticed headlights facing his vehicle in the opposite eastbound lane. Plaintiff continued to drive in a westbound direction at 40-55 miles per hour for about a mile and did not reduce his speed. As plaintiff neared the headlights, he saw a stalled automobile in his lane of travel. Plaintiff applied his brakes but was unable to stop in time to avoid colliding with the rear of the stalled automobile. It was knocked into yet another automobile which was stopped with its lights on, facing the stalled automobile in the westbound lane of the bridge.

The stalled automobile was operated by defendant's decedent Bowe, the automobile in the eastbound lane was operated by defendant Francis and the third automobile, stopped and facing the stalled automobile in the westbound lane, was operated by defendant Pledger.

Defendants Pledger and Francis's motions for summary judgment were granted. Plaintiff appeals.

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Walker, Lambe and Crabtree, by Guy W. Crabtree, for plaintiff-appellant.

Wilson and Ellis, by M. H. Hood Ellis and David W. Boone for defendant-appellee Thaddeques Arnell Pledger.

Leroy, Wells, Shaw, Hornthal and Riley, by L. P. Hornthal, Jr., for defendant-appellee James Andrew Francis.

EAGLES, Judge.

I.

Plaintiff first assigns as error the trial court's granting of summary judgment on all issues in favor of defendants Pledger and Francis. We find no error.

Summary judgment is a device whereby judgment is rendered before trial if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The goal of this procedural device is to allow disposition before trial of an unfounded claim or defense. *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 303 S.E. 2d 365 (1983).

Plaintiff argues that issues of negligence are generally not susceptible of summary adjudication because the applicable standard of care—usually that of the reasonably prudent man—must be employed by the jury under appropriate instructions from the court. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). He also argues that only in exceptional cases involving the question of reasonable care will summary judgment be an appropriate procedure to resolve the matter. *Gladstein v. South Square Associates*, 39 N.C. App. 171, 249 S.E. 2d 827, cert. denied, 296 N.C. 736, 254 S.E. 2d 178 (1979). We agree but hold that this is an exceptional case in which the summary judgment was appropriate.

The standard for granting summary judgment in negligence cases is stated in *Whitaker v. Blackburn*, 47 N.C. App. 144, 266 S.E. 2d 763 (1980) where the court said:

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Summary judgment may be appropriate in negligence cases when it appears there can be no recovery for plaintiff even if the facts claimed by plaintiff are accepted as true. [Citation omitted.] If the material before the Court at the summary judgment hearing would require a directed verdict for defendants at trial, defendants are entitled to summary judgment. 47 N.C. App. 147, 266 S.E. 2d at 765.

Here, the record discloses that the following facts are not in dispute: This suit arises out of a four car collision on the Wright Memorial Bridge. Donney E. Bowe (Deceased) was stopped in the westbound lane of the bridge facing west, the plaintiff's direction of travel. Defendant Pledger had stopped to render assistance and was parked in front of the Bowe automobile, in the westbound lane but facing east, toward the oncoming Bowe automobile. Defendant Francis was operating his automobile eastward across the bridge in the eastbound lane in the immediate vicinity of the Bowe and Pledger automobiles. There was some dispute as to whether the Francis automobile was moving or stopped.

Plaintiff's automobile approached in the westbound lane and collided with the rear of the Bowe automobile knocking it into the automobile operated by Pledger. Plaintiff's forecast of evidence failed to show any negligence by defendant Francis. Francis was lawfully operating his vehicle in his own lane of travel when the collision occurred in the other lane.

Negligence on the part of Pledger, if proven, could not have been a proximate cause of plaintiff's injury. Plaintiff struck the stalled Bowe automobile which in turn was knocked into the Pledger automobile. Plaintiff fails to show that this event injured him.

We hold that even if the facts claimed by the plaintiff are true, the material before the trial court at the summary judgment hearing would have required a directed verdict for defendants Pledger and Francis at trial. Accordingly, defendants Pledger and Francis are entitled to summary judgment.

II.

Plaintiff next assigns as error the trial court's denial of a motion for a new hearing based on newly discovered evidence. We

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find no error. The trial court determined in its discretion that plaintiff failed to offer newly discovered evidence which could not, with reasonable diligence, have been discovered and produced at trial.

The record fully supports the trial court's ruling. Plaintiff has failed to show that the record affirmatively demonstrates a manifest abuse of discretion which would be required for reversal. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982).

For these reasons, the judgment of the trial court is affirmed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. ANTHONY EUGENE IKARD

No. 8422SC186

(Filed 6 November 1984)

Robbery § 4.7— armed robbery—aiding and abetting—evidence not sufficient

The evidence was not sufficient to submit armed robbery or common-law robbery to the jury where it showed that defendant was one of four men who got into the victim's automobile and directed him to drive to a "liquor house"; that defendant, who was sitting in the back seat, took an AM-FM radio belonging to the victim with him as he walked away from the car with the other men; that the victim called out for the return of his radio; that two of the men went back to the victim, where one produced a sawed-off shotgun and demanded the victim's money while the others shoved the victim and took eighteen dollars from his wallet; and that defendant remained twenty to twenty-five feet from the victim and did not speak or move toward the victim. There was no evidence that defendant knew the victim would be robbed or that one of his companions was armed, and no evidence that he encouraged the crime or indicated that he was prepared to render assistance.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 6 December 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 18 October 1984.

Defendant was charged in a proper bill of indictment with armed robbery of Grady Lee Anderson, in that he

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unlawfully, willfully and feloniously did steal, take, and carry away . . . another's personal property, to wit: one (1) AM-FM multi-band radio, and \$48.00 dollars, from the presence and person of Grady Lee Anderson . . . with the use and threatened use of firearms . . . to wit: a sawed-off shotgun. . . .

Defendant was found guilty as charged, and from a judgment imposing a prison sentence of twenty-five years he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Walter M. Smith, for the State.

T. Michael Lassiter for defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the denial of his timely motions to dismiss. When the evidence is considered in the light most favorable to the State, it tends to show that on 20 May 1983 four men got into the automobile belonging to Grady Anderson and directed him to drive them to a "liquor house" in Statesville known as the Cabin in the Pines. The defendant sat in the back seat of the car and, when Mr. Anderson stopped in the parking lot of the Cabin in the Pines, the defendant emerged from the vehicle, taking with him an AM-FM radio that belonged to Mr. Anderson. The other men also got out of the car, and the four men walked down the driveway toward the building. Mr. Anderson also got out of the car and called to the men, "Hey, bring my radio back here. You made me give you a ride, now give me my radio back." The four men stopped, looked back, and then turned around and walked a few steps further away, until they were approximately twenty to twenty-five feet from Mr. Anderson. Two of the men then turned around and came back toward Mr. Anderson, and one pulled a sawed-off shotgun from under his raincoat, placed the barrel close to the victim's face, and said, "Give me your money." The second man then shoved Mr. Anderson, and took eighteen dollars from the victim's wallet. Defendant and the fourth man remained twenty to twenty-five feet from Mr. Anderson and observed what took place. At no time during the ride or during the incident at the Cabin in the Pines did the defendant say anything, nor did defendant move toward Mr. Anderson while he was being robbed by the other men. After the two men took

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the money from Mr. Anderson, they walked back to where defendant and the other man stood, and the four walked away.

Although the evidence discloses that the defendant took Mr. Anderson's radio, there is no evidence from which the jury could find that the taking of the radio was accomplished by force, violence, or threatened use of a dangerous weapon. The evidence establishes that the crime with which defendant was charged occurred after the crime he committed in removing the radio from Mr. Anderson's vehicle.

The State contends that the evidence tends to show that the defendant committed the crime charged in the bill of indictment by "acting in concert" with or "aiding and abetting" the two men who actually perpetrated the armed robbery of Mr. Anderson. Indeed, the trial court instructed the jury that they could find defendant guilty only if they found that defendant either acted in concert with the other men or that he aided and abetted them in the commission of the crime. While we find plain error in the charge to the jury with respect to aiding and abetting, we need not discuss such error because we hold the evidence insufficient to require submission of the case to the jury as to this defendant on the charge of either armed robbery or common-law robbery, and, in our opinion, the evidence is not sufficient to raise an inference from which the jury could find beyond a reasonable doubt that defendant either acted in concert or aided and abetted any of the men in the commission of the crime charged.

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390, 395 (1979). A person aids or abets another in the commission of a crime when he "by word or deed, [gives] active encouragement to the perpetrator of the crime or by his conduct [makes] it known to such perpetrator that he [is] standing by to lend assistance when and if it should become necessary." *State v. Keeter*, 42 N.C. App. 642, 645, 257 S.E. 2d 480, 482 (1979) (quoting *State v. Ham*, 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953)).

In the instant case the evidence discloses only that defendant was present at the scene of the crime. The State introduced no evidence tending to show that defendant knew that his companions were going to rob Mr. Anderson, or even that he knew one of

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the men was armed. Nor was there any evidence tending to show that defendant encouraged the other men in the commission of the crime, or that he by word or deed indicated to them that he stood prepared to render assistance. The most that can be said on this evidence is that defendant was present when the crime was committed, and this is insufficient to take the case to the jury.

The judgment must be vacated and the defendant discharged.

Vacated.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. BOBBY LEE STALEY

No. 8318SC1217

(Filed 6 November 1984)

1. Indictment and Warrant § 11— variance in victim's name—doctrine of *idem sonans*—absence of prejudice

There was no fatal variance between an indictment charging defendant with the murder of "Raleigh Edward Mortez" and evidence that the victim's correct name was "Raleigh Edward Moretz" since the doctrine of *idem sonans* applied, and since defendant well understood that he was being tried for the murder of his father-in-law.

2. Homicide § 21.7— second degree murder—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of second degree murder of his father-in-law where it tended to show that defendant was angry with the victim for quarreling with and upsetting his wife and went at 1:15 a.m. to the house where the victim was visiting; the victim was lying on a couch in the living room when defendant entered the house with a loaded pistol in his hand; defendant pointed the gun at the victim's head; and the gun, which required a pull of three and a half to five pounds to fire, went off and propelled a bullet through the victim's brain.

3. Criminal Law § 126.3— return of verdict in open court

The requirement of G.S. 15A-1237(b) that verdicts be "returned by the jury in open court" was not violated when the trial judge, after being informed that the jury had reached a verdict, went to the door of the jury room, received the verdict sheet from the foreman, returned to the courtroom with the jury, read the verdict sheet aloud to them, and asked if that was their verdict.

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APPEAL by defendant from *Rousseau, Judge*. Judgment entered 3 June 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 August 1984.

Defendant, tried for first degree murder, was convicted of murder in the second degree and sentenced to the presumptive term of fifteen years. Both the State and the defendant presented evidence, and so much of it as is necessary for an understanding of our decision is stated in the opinion.

Attorney General Edmisten, by Associate Attorney General David E. Broome, Jr., for the State.

Robert S. Cahoon for defendant appellant.

PHILLIPS, Judge.

[1, 2] Defendant contends that his motion to dismiss, made at the end of all the evidence, should have been granted for two reasons: First, because of a fatal variance between the indictment and proof; and, second, because the evidence was insufficient to warrant his conviction. Though these are good grounds for dismissal in *appropriate* cases, this is not such a case. The variance between the indictment and proof in this case was of no consequence. In the bill of indictment, due to a typographical error, defendant was charged with the murder of Raleigh Edward Morte~~z~~, whereas the decedent's correct name was Raleigh Edward Moret~~z~~, as all the evidence showed. Under the rule of *idem sonans*, which we think applies in this instance, absolute accuracy in spelling names in legal proceedings, even in felony indictments, is not required. Names are used to identify people and if the spelling used, though inaccurate, fairly identifies the right person and the defendant is not misled to his prejudice, he has no complaint. See *State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943); 4 Strong's N.C. Index 3d, *Criminal Law* § 107.2 (1976). In this instance the defendant was not misled. The transposition of the two letters in Moret~~z~~'s last name was not noticed until the trial was over, and defendant well understood that he was being tried for the murder of his father-in-law, Raleigh Edward Moret~~z~~. As to the sufficiency of the evidence, it is not necessary to recite all the disjointed and melancholy circumstances that led up to defendant killing his father-in-law. Suffice it to say that evidence favorable to the State

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tended to show that: Defendant, angry with his father-in-law for quarreling with and upsetting his wife, went at 1:15 o'clock in the morning to the house where Moretz was visiting; Moretz was lying on a couch in the living room when defendant entered the house with a pistol, which he knew was loaded, in his hand; defendant approached within a foot of the decedent; no one else was close to them; and defendant pointed the gun at the decedent's head; the gun, which required a pull of three and a half to five pounds to fire, went off and propelled a bullet through the decedent's brain. From this evidence it was proper for the jury to conclude that the defendant intentionally shot and killed the decedent. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). That defendant's evidence tended to show that he was only trying to scare his father-in-law and the gun went off accidentally, when somebody stumbled into him, is beside the point. The conflicting evidence was for the jury to resolve, not us.

[3] Defendant also cites as error that the trial judge personally, out of the presence of defendant and his counsel, went to the jury room, asked the jury for their verdict, and took it from them. G.S. 15A-1237(b) requires that verdicts be "returned by the jury in open court." What happened in this case, according to the record, is that: After the jury had been deliberating for some time and had been reinstructed on certain matters, they were told to resume their deliberations and that if they wanted to recess before a verdict was arrived at to knock on the door and a recess would be allowed them. About two hours later, the jury knocked on the door and told the bailiff that they had a verdict. The judge then went to the door of the jury room, received the verdict sheet from the foreman, returned to the courtroom with the jury, read the verdict sheet aloud to them, and asked if that was their verdict. The record does not show any improper or secret communication with the jury. The identical procedure followed in this case has been deemed to comply with G.S. 15A-1237(b). *State v. Caudle*, 58 N.C. App. 89, 293 S.E. 2d 205 (1982), *cert. denied*, 308 N.C. 545, 304 S.E. 2d 239 (1983).

The defendant's several other assignments of error, all of which have been carefully examined and considered, likewise fail to show that during the course of the trial the court committed any error prejudicial to the defendant.

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No error.

Judges WEBB and JOHNSON concur.

JANE A. AZZOLINO; LOUIS AZZOLINO; MICHAEL LAWRENCE AZZOLINO, BY HIS GENERAL GUARDIANS, JANE A. AZZOLINO AND LOUIS AZZOLINO; REGINA MARY GALLAGHER, BY HER GENERAL GUARDIAN, JANE A. AZZOLINO; AND DAVID JOHN AZZOLINO, BY HIS GENERAL GUARDIAN, LOUIS AZZOLINO, PLAINTIFFS v. JAMES R. DINGFELDER; JEAN DOWDY; AND ORANGE-CHATHAM COMPREHENSIVE HEALTH SERVICES, INC., D/B/A HAYWOOD-MONCURE COMMUNITY HEALTH CENTER, DEFENDANTS

No. 8315SC1292

(Filed 20 November 1984)

1. Appeal and Error § 6.2— order not adjudicating all rights of all parties—right of immediate appeal—appeal from final judgment

Even if the trial court's orders dismissing plaintiff children's claims and leaving plaintiff parents' claims for trial affected a substantial right so that plaintiff children could have immediately appealed pursuant to G.S. 1-277, the children did not lose their right to appeal from the final judgment by choosing not to appeal immediately.

2. Physicians, Surgeons, and Allied Professions § 11— prenatal care—duty of health care providers—information about genetic risks

When defendants, a family nurse practitioner and an obstetrician-gynecologist, accepted a pregnant woman as their patient for prenatal care, they had a duty to provide reasonable care for her which also extended to the fetus she was carrying. This duty required defendants to provide the parents of the unborn child with material information about genetic risks so as to enable them to decide whether to terminate the pregnancy.

3. Physicians, Surgeons, and Allied Professions § 17.1— action for wrongful life—proximate cause

In an action for wrongful life by a child born with Down's Syndrome, the element of proximate cause was provided by allegations that the parents of the child would have aborted the fetus if they had received adequate advice from defendants about amniocentesis and the availability of genetic counseling and had learned through amniocentesis that the fetus had Down's Syndrome.

4. Physicians, Surgeons, and Allied Professions § 17.1— action for wrongful life

A child born with Down's Syndrome could maintain a "wrongful life" action against health care providers based on allegations that defendants negligently failed to inform the child's parents with respect to amniocentesis and the availability of genetic counseling, thereby preventing a parental choice

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to avoid the child's birth. The damages recoverable in a wrongful life action are limited to the extraordinary expenses to be incurred during the child's lifetime by reason of his impairment.

5. Physicians, Surgeons, and Allied Professions § 17.1— no right of action by siblings of “wrongfully born” child

A cause of action may not be maintained by the minor siblings of a “wrongfully born” child for damages allegedly suffered by them as a result of the wrongful birth under theories of negligence, nuisance per accidens or loss of parental consortium.

6. Physicians, Surgeons, and Allied Professions § 17.1— action for a wrongful birth

The parents of a child born with Down's Syndrome have a legally cognizable claim against defendant health care providers for “wrongful birth” of the child based on allegations that defendants negligently failed to advise plaintiffs with respect to amniocentesis and the availability of genetic counseling, and that if they had been properly advised, plaintiffs would have discovered through amniocentesis that the unborn child had Down's Syndrome and would have legally terminated the pregnancy by an abortion. The parents' recovery in a “wrongful birth” action is limited to damages for the mental anguish which they have endured and will continue to endure as a result of the birth of the impaired child.

7. Physicians, Surgeons, and Allied Professions § 17.1— family nurse practitioner — wrongful birth action—insufficient evidence

Plaintiffs' evidence in a wrongful birth action was insufficient to show that negligence by defendant family nurse practitioner in her advice concerning amniocentesis was a proximate cause of their damages where it showed that such defendant's advice did not influence plaintiffs in their decision to forego amniocentesis.

8. Physicians, Surgeons, and Allied Professions § 11.1— standard of care—applicable community

Although defendant obstetrician-gynecologist provided prenatal care to plaintiff mother at the Haywood-Moncure Community Health Center, the standard by which defendant's action should be judged in a wrongful birth action is that applicable to other obstetricians and gynecologists with similar training and experience practicing in Chapel Hill or a similar community where defendant was a professor at the UNC School of Medicine and on the staff at North Carolina Memorial Hospital, defendant's practice was based primarily in Chapel Hill, and defendant only practiced a half day a week in the Haywood-Moncure community.

9. Physicians, Surgeons, and Allied Professions § 17.1— wrongful birth action—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury in an action against defendant obstetrician-gynecologist for the wrongful birth of their child with Down's Syndrome where it tended to show that defendant provided prenatal care for plaintiff mother; plaintiff mother, who was 36 years old, expressed high con-

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cern about the risk that the child she was carrying might have Down's Syndrome in that she raised the question of amniocentesis herself and indicated that she had already decided to have the procedure; defendant told the mother not to worry about amniocentesis because that procedure was for women 37 years of age or older; as a result of this advice, plaintiffs decided to forego amniocentesis; the policy in defendant's medical community was to provide genetic counseling and to consider amniocentesis for women 35 and 36 who expressed high concern about Down's Syndrome; plaintiff mother would have had a legal abortion had she learned through amniocentesis that the fetus had Down's Syndrome; plaintiffs' child has severe mental retardation and other physical abnormalities which will require extraordinary medical treatment and continued care for the rest of his life; and plaintiffs have suffered emotional distress resulting from the fact that their child has Down's Syndrome.

10. Corporations § 27.2; Principal and Agent § 9— liability of corporation for physician's negligence

The evidence was sufficient to show that defendant physician was subject to interference or control by the corporate defendant with respect to the manner or method of performing his duties at a medical clinic operated by the corporate defendant so that the corporate defendant is liable under the doctrine of *respondeat superior* for the negligence of defendant physician in the performance of his duties at the clinic.

11. Damages § 12.1; Physicians, Surgeons, and Allied Professions § 21— actions for wrongful life and wrongful birth—punitive damages—insufficiency of complaint

Plaintiffs' complaint in actions for wrongful life and wrongful birth failed to state a claim for punitive damages where the alleged conduct of defendants which served as the basis for the claim for punitive damages occurred after the child's birth and did not accompany the tortious conduct which caused plaintiffs' injury.

APPEAL by plaintiffs from *Barnette, Judge*. Judgment entered 24 May 1983 in Superior Court, CHATHAM County. Heard in the Court of Appeals 25 September 1984.

On 13 October 1981, plaintiffs initiated this medical malpractice action seeking to recover from the defendants, Dr. James R. Dingfelder, Jean Dowdy, and Orange-Chatham Comprehensive Health Services, Inc., damages arising from the alleged wrongful birth of Michael L. Azzolino, who is the son of plaintiffs Louis and Jane Azzolino and the half-brother of plaintiffs Regina Gallagher and David Azzolino. Michael Azzolino was born on 11 October 1979 afflicted with a permanent genetic disorder known as Down's Syndrome which is characterized by mental retardation and other physical abnormalities.

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Jane Azzolino received prenatal care during her pregnancy with Michael at the Haywood-Moncure Community Health Center (hereinafter "the Clinic") which is a health facility in Chatham County operated by Orange-Chatham Comprehensive Health Services, Inc. (hereinafter "OCHHS"). At the Clinic, she was seen both by Jean Dowdy, a registered nurse and family nurse practitioner employed by the Clinic, and Dr. James R. Dingfelder, an obstetrician-gynecologist on the staff at North Carolina Memorial Hospital in Chapel Hill. Through a contractual arrangement between the University of North Carolina and OCHHS, Dr. Dingfelder spent one half day per week at the Clinic where he provided gynecological and obstetrical care for patients and supervised the work of the family nurse practitioners.

In the first cause of action of the complaint, plaintiffs Louis and Jane Azzolino (hereinafter "Mr. and Mrs. Azzolino" or "the plaintiff parents") set forth what we shall refer to as a "wrongful birth claim" wherein they alleged that defendants Jean Dowdy and Dr. Dingfelder were negligent in their prenatal care of Mrs. Azzolino in that they failed to properly advise her with respect to amniocentesis and the availability of genetic counseling; that had Mrs. Azzolino been properly advised, she would have had amniocentesis performed which would have revealed that her fetus had Down's Syndrome; and that had she known her fetus had Down's Syndrome, she would have legally terminated her pregnancy by having an abortion.

In the second cause of action of the complaint, Michael Azzolino through his parents as guardians set forth what we shall refer to as a "wrongful life claim." He alleged that as a direct and proximate result of the defendants' negligence, he was not aborted while still a fetus within his mother's womb, but was instead allowed to be born afflicted with Down's Syndrome thereby damaging him by virtue of his very existence. In the third cause of action, Michael's older half-siblings, Regina and David, alleged that they too have been damaged by their brother's wrongful birth, and that defendants should have reasonably foreseen that Regina and David would be damaged by the birth of a sibling with Down's Syndrome.

Plaintiffs further alleged that defendant OCHHS is liable for the negligence of the individual defendants under the doctrine of

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respondeat superior, and that Dr. Dingfelder is liable for the negligence of defendant Jean Dowdy under this same doctrine.

On 11 December 1981, defendants filed motions to dismiss the complaint, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the complaint and each of the causes of action stated therein failed to state a claim upon which relief can be granted. On 14 December 1982, the trial court entered orders allowing defendants' motions in part and dismissing Michael's cause of action for wrongful life and the siblings' cause of action. Subsequently, defendants moved for partial summary judgment on the issue of punitive damages which motion was allowed by the court by order entered 6 May 1983.

The only cause of action remaining for trial was the parents' claim for wrongful birth. At the close of plaintiffs' presentation of evidence at trial, defendants moved individually for directed verdicts pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. The court allowed the motions, thereby dismissing the wrongful birth claim. From the judgment entered 24 May 1983 finally terminating the action, plaintiffs appealed.

Tim Hubbard for plaintiff appellants.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by C. Ernest Simons, Jr. and Steven M. Sartorio, and Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Roger B. Bernholz, for defendant appellees.

HILL, Judge.

I

[1] The threshold question we must address is whether the appeals taken by Michael Azzolino and his siblings were timely made. Defendants contend the court's orders of 14 December 1982 dismissing the children's claims constituted a final adjudication of those claims because they were separate and distinct from the claims of the parents; that the court's orders affected a substantial right of the parties; and therefore an appeal from those orders should have been taken within ten days from their entry. Having failed to appeal immediately from the entry of those orders, defendants contend the plaintiff children waived their

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rights to appeal and should not now be allowed to challenge the trial court's decision regarding their claims. We disagree.

Although the court's orders of 14 December 1982 may have been final in nature with respect to the children's claims, such orders were not final judgments as defined by Rule 54 of the North Carolina Rules of Civil Procedure because they adjudicated the rights and liabilities of fewer than all the parties and did not contain a determination by the trial court that there was no just reason for delay. *See* G.S. 1A-1, Rule 54(b). Thus, an immediate appeal could only have been taken from the 14 December 1982 orders if they affected a substantial right of the parties. *See* G.S. 1-277; G.S. 1A-1, Rule 54(b).

Assuming *arguendo* that the 14 December 1982 orders affected a substantial right of the parties, the plaintiff children could have immediately appealed pursuant to G.S. 1-277 if they so desired. However, they were not required to do so. *See Ingle v. Allen*, 71 N.C. App. 20, 321 S.E. 2d 588 (1984); *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 301 S.E. 2d 414 (1983). By choosing not to appeal immediately, plaintiffs may have lost their right to have all their claims tried at one time, but they did not lose their right to appeal from the final judgment. *Id.* We conclude that the plaintiff children adequately preserved their right to appeal from the orders dismissing their claims by noting exceptions to those orders and giving timely notice of appeal after entry of the final judgment in the action.

II

We turn now to the merits of the appeal before us. This appeal presents several questions of first impression in this state including the following: (1) whether a cause of action for "wrongful life" may be maintained; (2) whether a cause of action for "wrongful birth" may be maintained; and (3) whether a cause of action may be maintained by the minor siblings of a "wrongfully born" child for damages allegedly suffered by them as a result of the wrongful birth. The causes of action which the plaintiffs seek to have recognized were unknown under the common law and have not been provided for by statute in this state; however, it has been argued that they are logically consistent with the traditional tort framework of duty, breach, proximate cause, and damages. *See generally* Note, "Wrongful Life: A Modern Claim Which Con-

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forms to the Traditional Tort Framework," 20 Wm. and Mary L. Rev. 125, 155 (1978); *Harbeson v. Parke-Davis*, 98 Wash. 2d 460, 656 P. 2d 483 (1983). The theoretical bases of the actions concerned herein are closely related in that all are founded essentially upon a theory of negligence or medical malpractice, and reflect the claims of an impaired child and other members of his immediate family against a physician and other health care provider for their failure to properly advise the mother about amniocentesis and the availability of genetic counseling. See *Procanik v. Cillo*, 97 N.J. 339, 478 A. 2d 755 (1984). Although there are obvious similarities between the causes of actions which plaintiffs seek to assert, there are also crucial differences as shall be demonstrated by our analysis of each proposed cause of action.

III

The first issue we shall address is whether a cause of action for "wrongful life" may be maintained in this state. In the context of the present case, this issue is framed as whether the trial court erred in dismissing Michael Azzolino's claim for wrongful life pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). A cause of action should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See *O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979).

The cause of action brought by Michael Azzolino sets forth a claim for what is often referred to as "wrongful life." A wrongful life claim is one brought by or on behalf of an impaired child who alleges that but for the defendant doctor or health care provider's negligent advice to or treatment of his parents, the child would not have been born. See *Harbeson* and *Procanik*, *supra*; Comment, "Wrongful Life: The Right Not To Be Born," 54 Tul. L. Rev. 480, 484-85 (1980). The essence of the child's claim is that the defendants wrongfully deprived his parents of information which would

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have prevented his birth. *See Procanik, supra* at 760. As stated in Comment, " 'Wrongful Life': The Right Not To Be Born," *supra* at 485:

The child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence—his failure to adequately inform the parents of the risk—has caused the birth of the deformed child. The child argues that but for the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.

In the present case, plaintiffs alleged as follows: During the spring of 1979, Mrs. Azzolino was in the first trimester of pregnancy and was accepted by defendants as their patient for prenatal medical care. Mrs. Azzolino advised the individual defendants that she was 36 years old and requested their medical advice with respect to the advisability of having a diagnostic procedure known as amniocentesis performed on her for the purpose of determining whether her fetus had genetic defects. In response to a direct question from Mrs. Azzolino regarding the advisability of this procedure, defendant Jean Dowdy spoke of her own personal and religious prejudices, and those of her husband, against the use of amniocentesis. She advised Mrs. Azzolino of the medical risks associated with amniocentesis, without setting those risks in the context of a complete risk-benefit analysis and thus unduly emphasized those risks.

In response to a similar question addressed to him, Dr. Dingfelder advised Mrs. Azzolino that she need not worry about amniocentesis because it was not necessary or advisable for her as the upswing was for women 37 years of age or older. Mr. and Mrs. Azzolino quite foreseeably relied upon the defendants' advice; therefore, Mrs. Azzolino did not undergo amniocentesis. In giving such advice to Mrs. Azzolino, and in failing subsequently to cure such advice, the individual defendants negligently departed from the standard of practice applicable to him or her. Dr. Dingfelder was also negligent in his supervision of Jean Dowdy. Defendant OCCHS is liable for the negligence of the individual defendants under the doctrine of respondeat superior. Had Mrs. Azzolino been properly advised, she would have had an amniocentesis performed which would have revealed that her fetus

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had Down's Syndrome. Had she been informed that her fetus had Down's Syndrome, Mrs. Azzolino would have legally terminated her pregnancy by having an abortion. Instead, as a direct and proximate result of defendants' alleged negligence, Michael Azzolino was allowed to be born afflicted with Down's Syndrome and has been made to suffer a life with impairments to which nonexistence would be preferable.

We begin our analysis of Michael's proposed cause of action by determining whether it fits within the traditional tort framework. As with any action founded upon negligence, Michael, in order to successfully pursue his claim, must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party. See *Becker v. Schwartz*, 46 N.Y. 2d 401, 410, 386 N.E. 2d 807, 811 (1978); 57 Am. Jur. 2d Negligence § 33 (1971).

[2] First, we must determine whether the individual defendants owed a duty to Michael. Unless a duty exists, there can be neither a breach nor liability. W. Prosser, *Handbook of the Law of Torts* § 53 (4th ed. 1971). Here, the individual defendants allegedly accepted Mrs. Azzolino as their patient for prenatal care; therefore, they clearly had a duty to provide reasonable care for her. We believe the defendants' duty extended not only to Mrs. Azzolino but also to the fetus she was carrying. The recognition of such a duty is a logical extension of our Supreme Court's holding in *Stetson v. Easterling*, 274 N.C. 152, 161 S.E. 2d 531 (1968), that an infant can recover damages for prenatal negligence. "Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence." *Id.* at 156, 161 S.E. 2d at 534, quoting with approval *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966). In *Stetson*, the Supreme Court impliedly recognized that a duty of care is owed to a child that is in utero at the time negligent acts occur. However, liability for breach of that duty is conditioned upon the subsequent live birth of the child. See *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E. 2d 382, cert. denied, 287 N.C. 464, 215 S.E. 2d 623 (1975).

We believe the defendants' duty required them to provide the plaintiff parents with material information about genetic risk

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so as to enable them to decide whether to avoid Michael's birth. While the disclosure of such information to the parents does not force them to prevent the child's birth, it does make them aware of the possibility or probability that their future children will be genetically impaired and gives them an opportunity to decide whether life is best for the child. *See Note, "Wrongful Life . . ."* *supra*, 20 Wm. and Mary L. Rev. at 140. Thus, defendants' duty required that they afford Michael, vicariously through his parents, an opportunity to be relieved of a life with impairments. *Id.* *See also, Harbeson, supra* at 491. Defendants did not have a duty to prevent Michael's birth. Defendants' duty was to provide the plaintiff parents with complete and accurate information about any genetic risks of which they needed to be aware.

Before liability for negligence can be imposed on defendants, plaintiffs must also show that defendants breached their duty by failing to conform to the appropriate standard of care. *See W. Prosser, Handbook of the Law of Torts* § 30 (4th ed. 1971). It does not appear beyond doubt in this case that plaintiffs cannot prove such breach by defendants; therefore, the cause of action for wrongful life is not fatally defective on this basis.

[3] We must next determine whether the defendants' alleged negligence proximately caused the injury allegedly suffered by Michael, his birth itself. Assuming for the moment that Michael has suffered a legally cognizable injury and taking the allegations of the complaint as true, we find the complaint states a sufficient causal relationship between the defendants' alleged negligence in advising Mrs. Azzolino about amniocentesis and the subsequent birth of Michael Azzolino to withstand a Rule 12(b)(6) motion to dismiss. An argument is often made in wrongful life cases that the maternal illness or genetic condition, not the physician's negligence, was the proximate cause of the child's injury. *See Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967). This argument has been repeatedly rejected because it misinterprets the gravamen of the complaint, which is that the defendants' negligence precluded any parental decision to abort the fetus. *See Phillips v. United States*, 508 F. Supp. 537 (D.C.S.C. 1980) (hereinafter "*Phillips I*"); *Robak v. United States*, 658 F. 2d 471 (7th Cir. 1981); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978). The relevant causal relationship in wrongful life cases

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is between the defendant's negligence and the subsequent birth of the child, not between the defendant's negligence and the genetically impaired condition of the child.

We believe any objections to the recognition of Michael Azzolino's cause of action for wrongful life based on lack of proximate cause are overcome by his parents' allegations that had they received adequate information from defendants, they would have aborted the fetus. Moreover, we believe the birth of Michael Azzolino in an impaired state was clearly a foreseeable consequence of the defendants' alleged negligence; therefore, his cause of action is not fatally defective on the ground that his injury was not reasonably foreseeable.

[4] Next, we consider the most problematical element in the analysis of the wrongful life claim—injury and the extent of damages. The majority of courts which have considered wrongful life claims have refused to recognize their validity concluding either that the child had not sustained a legally cognizable injury or that appropriate damages were impossible to ascertain. *See, e.g., Becker, supra; Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W. 2d 372 (1975); *Moore v. Lucas*, 405 So. 2d 1022 (Fla. App. 1981). However, in recent years a trend has emerged towards allowing an impaired child to maintain an action for wrongful life in order to recover as special damages the extraordinary expenses to be incurred during the child's lifetime as a result of his impairment. *See Turpin v. Sortini*, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P. 2d 954 (1982); *Harbeson v. Parke-Davis*, 98 Wash. 2d 460, 656 P. 2d 483 (1983); *Procanik v. Cillo*, 97 N.J. 339, 478 A. 2d 755 (1984). Even these jurisdictions, however, have refused to recognize the child's claim for general damages on the ground it is impossible to assess general damages in any fair, nonspeculative manner. *Id.* For the reasons that follow, we conclude Michael has suffered a legally cognizable injury for which he may recover as special damages the extraordinary expenses to be incurred during his lifetime as a result of his impairment.

In a wrongful life action, the injury suffered by the plaintiff child is his very existence itself. The essence of the child's claim is that because of his impairments, he would have been better off had he not been born. Some courts have refused to recognize an

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action for wrongful life on the ground that the injury which the child has suffered is not a legally cognizable one because "considerations of public policy dictate a conclusion that life—even with the most severe of impairments—is, as a matter of law, always preferable to nonlife." *Turpin, supra* at 961. See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A. 2d 8 (1979), *overruled in Procanik, supra*; *Phillips I, supra*. It has been argued that even though the impaired child may experience a great deal of physical and emotional pain and suffering, he or she will still be able "to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life and which are far more valuable than the suffering she (or he) may endure." *Berman, supra*, 80 N.J. at 430, 404 A. 2d at 13.

While we agree this may be arguably true in some cases, we do not agree it is always or necessarily so. We are unwilling, and indeed, unable to say as a matter of law that life even with the most severe and debilitating of impairments is always preferable to nonexistence. We believe that a child, who is as severely impaired as Michael Azzolino, has suffered a legally cognizable injury; therefore, Michael's action for wrongful life should not be dismissed for lack of actionable injury.

With respect to the question of damages, we agree with the position taken by other courts that a child's claim for general damages for being born impaired as opposed to not being born at all should be denied because of the impossibility of assessing such damages in any fair, nonspeculative manner. See *Turpin, Procanik*, and *Harbeson, supra*. Under traditional tort principles, damages are generally intended to restore an injured person as nearly as possible to the position he would have been in but for the defendant's negligence. See C. McCormick, *Damages* § 137 (1935); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967). See also *Phillips v. Chesson*, 231 N.C. 566, 58 S.E. 2d 343 (1950). In a wrongful life case, there is a problem with this remedy because had the defendant's negligence not occurred, the plaintiff child would not have been born. As stated by the court in *Becker v. Schwartz*, 46 N.Y. 2d 401, 412, 386 N.E. 2d 807, 812 (1978): "[A] cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not

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equipped to make." Since there does not appear to be any rational, nonspeculative way to measure the child's general damages, we agree that such damages should not be recoverable.

On the other hand, the child's special damages for the extraordinary expenses to be incurred during the child's lifetime as a result of his impairment are reasonably certain and readily ascertainable, and therefore, should be recoverable. The expenses to which we are referring consist of the extraordinary costs of special treatment, teaching, care, medical services, aid and assistance for the child because of his impairment. Indeed, it is only fair to place the burden of paying those expenses on the defendant whose negligence was a proximate cause of the child's need for such special care. As stated by Justice Jacobs of the New Jersey Supreme Court in his dissenting opinion in *Gleitman v. Cosgrove*, *supra*, 227 A. 2d at 703: "While the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation toward alleviating the financial burdens." The question remains, however, of who is entitled to recover for those expenses—the child himself or his parents.

The majority of courts have allowed parents bringing wrongful birth actions to recover for those expenses incurred by them and likely to be incurred by them in the future as a result of their child's impairment, but have refused to recognize the right of the child to sue on his own behalf to recover these or any other damages. *See, e.g., Moores, supra; Becker, supra.* The parents' right to recover these expenses is of course based upon their support obligation. The highest courts of three states—Washington, California, and New Jersey—have held that an impaired child has a right to recover these damages on his own behalf by bringing an action for wrongful life, and have indicated that either the parents or the child, but not both, may recover for these extraordinary expenses. *See Harbeson, Turpin, and Procanik, supra.* These courts have reasoned that it would be illogical and anomalous to permit only the parents, and not the child, to recover for these expenses because the right to recover for them should not depend upon the wholly fortuitous circumstance of whether the parents are available to sue or whether the expenses are incurred at a time when the parents remain legally responsible for providing such care. *Id.*

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We agree it would be illogical and unjust to permit only the parents and not the child to recover for these expenses because to hold otherwise would in some situations deprive the child of the recovery to which he is entitled. However, we believe the right to recover for the cost of the extraordinary care needed by the child because of his impairment should be vested in the child alone. Under North Carolina law, when an unemancipated minor suffers injuries by reason of the tortious conduct of another, the minor's parents because of their support obligation are ordinarily deemed to have the right to recover for pecuniary expenses incurred or likely to be incurred by them as a consequence of the injury including the expenses of medical treatment. 3 R. Lee, N.C. Family Law § 241 (4th ed. 1981). However, this is not the ordinary case, and we believe the unusual nature of the wrongful life and wrongful birth actions justify a departure from the usual rule.

It is the child who must bear the burden of his impairment, and though the parents must bear the burden of paying for much, if not all, of the special care required because of the child's impairment because of their support obligation, it is the child who suffers if the money is not there to pay for the care that he needs. For that reason, we feel it is best to permit the child to sue on his own behalf, through his guardians, for these special damages. This will ensure that the recovery is used for its intended purpose—to pay for the extraordinary care required by the child because of his impairment—and not for any other purpose by the parents. Of course, the parents should be entitled to disbursements from the child's recovery for reasonable expenses incurred by them for special care for the child subject to the approval of the clerk of superior court. See G.S. 33-1, *et seq.* Thus, allowing the child to sue on his own behalf, through his guardians, will not only best protect the interests of the child, it will not in any way injure the interests of the parents.

We conclude that an action for wrongful life sufficiently conforms to the traditional tort framework and contains the requisite elements for a negligence action. It has been argued in other jurisdictions that policy considerations, other than the ones we have previously discussed herein, compel the disallowance of a wrongful life claim, *see, e.g., Phillips I, supra* at 543, but we find these arguments unpersuasive. Rather, we believe policy considerations

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weigh in favor of recognition of the wrongful life action, as well as the wrongful birth action, because recognition of both will "promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong." (Footnotes omitted.) Rogers, "Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing," 33 S.C. L. Rev. 713, 757 (1982) (hereinafter "*Rogers*").

Accordingly, we hold that an impaired child may maintain an action for wrongful life in order to recover as special damages the extraordinary expenses to be incurred during the child's lifetime as a result of his impairment and that the cause of action asserted by Michael Azzolino sufficiently sets forth a claim for wrongful life; therefore, the trial court erred in dismissing Michael's claim.

IV

[5] Next, we shall consider whether a cause of action may be maintained by the minor siblings of a "wrongfully born" child for damages allegedly suffered by them as a result of the wrongful birth. Plaintiffs contend the trial court erred in dismissing the cause of action brought by the minor half-siblings of Michael Azzolino for failure to state a claim upon which relief can be granted, and in striking paragraph 3 of the complaint in which the siblings alleged that they reside with the plaintiff parents. The siblings claim they have been damaged by their brother's wrongful birth in that they must suffer the family hardships, financial, emotional and otherwise, associated with having a Down's Syndrome child in the family; and have been and will continue to be deprived of the full measure of the society, comfort, care, and protection of the plaintiff parents because of the extraordinary demands placed on them by Michael; and that defendants should have reasonably foreseen that their negligence would result in such damage to the siblings.

Our research has not disclosed any appellate court decisions, of this or any other jurisdiction, in which the precise question presented here has been addressed. However, six jurisdictions have considered and rejected similar claims brought by siblings of a normal, healthy child born after a negligently performed sterilization procedure. See *Aronoff v. Snider*, 292 So. 2d 418 (Fla. App. 1974); *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S. 2d 834 (1974);

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Coleman v. Garrison, 349 A. 2d 8 (Del. 1975); *Sala v. Tomlinson*, 73 A.D. 2d 724, 422 N.Y.S. 2d 506 (1979); *Miller v. Duhart*, 637 S.W. 2d 183 (Mo. App. 1982); *White v. United States*, 510 F. Supp. 146 (U.S.D.C. 1981). Like the present case, the siblings in these cases claimed that their sibling's birth diminished their share of their parents' society, comfort, care, protection and financial support.

In most of these cases, the siblings' cause of action was summarily rejected on the ground there is no basis in law or logic for such an action. See, e.g., *Aronoff*, *White*, and *Miller*, *supra*. In *Cox*, *supra*, the court discussed the merits of the cause of action at greater length and reached the same conclusion on the grounds that there was no duty owed by the defendant to the siblings, no violation of the siblings' fundamental right which would support their claim, and no allegation in the complaint of injury to the siblings themselves. The court further stated:

While children may expect "future care, affection, training and financial support," they have no vested right to it. . . . There is no "proportional" share of their parents' worldly goods to which children are entitled and except that parents are bound to provide for their children and keep them from the public rolls . . . , infants are not entitled as a matter of right to any specific share of their parents' wealth, much less their "care," "affection" or "training."

352 N.Y.S. 2d at 840.

The present case differs from these cases only in that the siblings here seek additional damages for emotional and other hardships suffered by them because of Michael's impairment. Despite these differences, we believe the siblings' claim in the present case is substantially the same as the siblings' claim in the above-cited cases and is equally lacking in merit.

We shall briefly address the theories under which the siblings seek to bring their action. The siblings contend their claim is cognizable either as a negligence action, or under a theory of nuisance per accidens, or under a theory of loss of parental consortium. We disagree. To begin with, the siblings' claim fails under a negligence theory because it does not evince the required elements for a negligence action. See *Prosser*, *supra* at § 30. Specifically, there was no duty owed by defendants to the sib-

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lings. Secondly, the siblings' reliance on the theory of nuisance to justify recognition of their claim is misplaced. Nuisance is a theory of tort liability which rests upon an unreasonable interference with one's use and enjoyment of land. *Morgan v. Oil Co.*, 238 N.C. 185, 77 S.E. 2d 682 (1953). Since there is no property interest at stake here, this theory is inapplicable. Furthermore, we find the idea of classifying a child who is impaired, such as Michael Azzolino, as a nuisance for legal purposes to be morally repugnant.

Lastly, we reject the siblings' argument that their claim is legally cognizable under a theory of loss of parental consortium. Though the courts of this state have not previously considered whether a child may bring an action for loss of his parents' society, comfort, care, and protection where such loss was caused by the negligence of a third person, our Supreme Court has rejected such a claim where it was alleged the third person intentionally caused such loss. See *Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949). *Henson* concerned a civil action brought by minor children to recover damages for criminal conversation with and alienation of the affections of the children's mother. The children alleged that the defendant, by seducing and alienating the affections of their mother, caused them to lose the companionship, guidance and care of their parents. The Supreme Court phrased the question presented in the case and its holding as follows:

May children, acting through their father as next friend, maintain an action against a third party for damages for wrongfully disrupting the family circle and thereby depriving them of the affection, companionship, guidance and care of their parents? This is the question posed for decision. We are constrained to answer in the negative.

Id. at 174, 56 S.E. 2d at 433. In denying the children's claim, the Court stated:

The asserted cause of action was not known to the common law. It has no statutory sanction. It is not for the courts to convert the home into a commercial enterprise in which each member of the group has a right to seek legal redress for the loss of its benefits.

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Id. at 176, 56 S.E. 2d at 434. We believe the Court's language in *Henson* applies with equal force to the present situation and compels us to reject the siblings' argument based on loss of parental consortium.

We conclude that there is no basis in law for the siblings' cause of action and affirm the rulings of the trial court dismissing their claim and striking paragraph 3 of the complaint. We note that much of the damage to the siblings' interests, particularly with respect to the extraordinary financial burden placed on the family by the birth of the impaired child, is compensated for by the damages recovered in the wrongful life action.

V

[6] Next we consider the cause of action brought by Mr. and Mrs. Azzolino, the plaintiff parents. As stated previously, the plaintiff parents alleged that the defendants were negligent in their prenatal care of Mrs. Azzolino in that they failed to properly advise her with respect to amniocentesis and the availability of genetic counseling; that had Mrs. Azzolino been properly advised, she would have had amniocentesis performed which would have revealed that her fetus had Down's Syndrome; and that had she been informed that her fetus had Down's Syndrome, she would have terminated the pregnancy. In essence, the parents' claim is that Michael's birth was wrongful in that had it not been for the defendant's negligence, the parents would have prevented Michael's birth.

Though not labeled as such in the complaint, the plaintiff parents' cause of action sets forth a claim for "wrongful birth." A wrongful birth action is an action brought by parents against a physician or other health care provider who allegedly failed to inform them of the increased possibility that the mother would give birth to a child suffering from birth defects thereby precluding an informed decision about whether to have the child. *See* Comment, "*Berman v. Allen*," 8 Hofstra L. Rev. 257, 257-8 (1979), cited in *Harbeson, supra* at 487. In a wrongful birth action, the parents claim that but for the negligence of the physician or other health care provider they would have avoided conception or terminated the pregnancy. *Jackson v. Bumgardner*, 71 N.C. App. 107, 321 S.E. 2d 541 (1984); *see also Harbeson and Berman, supra*.

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As we noted in *Jackson, supra*, this type of action is to be distinguished from an action for wrongful conception or wrongful pregnancy (hereinafter "wrongful pregnancy") which is an action brought by parents of a healthy, but unplanned, child against a physician or other health care provider for negligently performing a sterilization procedure or an abortion, or against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription. In a wrongful pregnancy action, the defendant's negligence was allegedly a proximate cause of the birth of a healthy, but unplanned, child; whereas in a wrongful birth action, the defendant's negligence was allegedly a proximate cause of the birth of an impaired child. See *Jackson, supra*. Although there are obvious similarities between wrongful birth and wrongful pregnancy actions, it is important to distinguish between them because other jurisdictions have consistently treated them differently particularly with respect to damages. See *Harbeson, supra*.

The appellate courts of this state have not previously considered the validity of a wrongful birth action. However, this Court has recognized that an action for wrongful pregnancy is legally cognizable under existing legal principles of this jurisdiction. See *Pierce v. Piver*, 45 N.C. App. 111, 262 S.E. 2d 320, appeal dismissed, 300 N.C. 375 (1980). Though certainly not conclusive, this does provide support for recognition of the wrongful birth action. Also weighing in favor of recognition of this cause of action is the fact that the jurisdictions that have considered wrongful birth actions are currently unanimous in their recognition of its validity. See *Phillips v. United States*, 508 F. Supp. 544, 549 (D.C.S.C. 1981) (hereinafter "*Phillips II*") and the cases cited therein.

Some of the earlier decisions refused to recognize the validity of the wrongful birth action because of the perceived impossibility of ascertaining damages and the public policy against abortion. See, e.g., *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967). These rationales for rejecting the cause of action are no longer considered valid. See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A. 2d 21 (1979). See also *Phillips II, supra* at 549-550. In fact, it now appears that policy considerations support, rather than militate against, recognition of the action for wrongful birth. *Accord, Phillips II* and *Berman, supra*. Refusing to recognize the

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cause of action "would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects. (Citations omitted.)" *Berman v. Allan*, 80 N.J. at 432, 404 A. 2d at 14.

Clearly, the cause of action for wrongful birth fits comfortably within the traditional tort framework and contains the required elements for a negligence action—duty, breach, proximate cause, and damages. Except for the more difficult element of damages, we need only discuss these briefly. In wrongful birth actions, the defendant's professional relationship with the mother clearly establishes a duty of due care. The question of whether the defendant breached his duty must be determined by expert testimony and is not a matter which bars recognition of the cause of action. As with the wrongful life action, we believe the parents' allegations that had they been properly informed regarding the risk of genetic defects, they would have terminated the pregnancy or avoided conception are sufficient to establish that the defendant's alleged negligence was a proximate cause of the parents' damages.

With respect to damages, courts have disagreed as to the measure of damages but have agreed that at least some damages are recoverable. See *Rogers, supra* at 750-752; *Phillips II, supra* at 551. Some courts allow the parents to recover damages only for the extraordinary expenses relating to the child's impairment which must be borne by them. See *Becker and Moores, supra*; see also *Jacobs v. Theimer*, 519 S.W. 2d 846 (Tex. 1975). These expenses would be those which are over and beyond the expenses parents would normally incur in raising a healthy child. Other courts allow the parents to recover damages only for their pain and suffering and mental anguish resulting from the birth of the impaired child. See *Karlsons v. Guerinot*, 57 A.D. 2d 73, 394 N.Y.S. 2d 933 (1977); *Berman, supra*. Still others allow recovery for both mental anguish and the extraordinary expenses relating to the child's impairment. See *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W. 2d 209 (1981); *Harbeson, supra*. One court has even allowed the parents to recover all the expenses incident to the care of the child without reducing the amount of the recovery by the cost of raising and supporting a normal, healthy child. See *Robak v. United States*, 658 F. 2d 471 (7th Cir. 1981).

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In the present case, the parents seek to recover damages for the medical and hospital expenses of the pregnancy and childbirth; damages for the nervousness, inconvenience, physical restrictions, loss of consortium, and anxiety suffered by them because of the pregnancy and childbirth; damages for the mental anguish which they have endured and will continue to endure because they have brought into the world a child afflicted with Down's Syndrome; the ordinary and extraordinary cost of supporting, educating, and providing the attention for Michael which he requires; damages for past and future loss or diminution of the consortium of each other because of the extraordinary demands placed on them by Michael; damages for Mrs. Azzolino's lost earnings occasioned by her pregnancy and by the need for her to care for Michael on a daily basis; and other miscellaneous damages. We agree that at least some of these damages are recoverable; therefore, the plaintiff parents' cause of action is not fatally deficient for lack of ascertainable damages.

In determining what damages are recoverable, we again have a problem applying traditional tort principles which dictate that damages are intended to restore the injured person to the position he would have been in but for the defendant's negligence. See C. McCormick, *supra*. In a wrongful birth action, had the defendant's negligence not occurred, the parents would have terminated the pregnancy and would not have incurred any of the costs for which they seek recovery, nor would they have suffered the loss of consortium and mental anguish resulting from the birth of the impaired child. However, allowing the parents to recover for all the damages proximately resulting from the defendant's negligence would inflict a penalty on the defendants that is wholly disproportionate to the culpability involved and would place an unreasonable financial burden upon health care providers. Accord, *White v. United States*, 510 F. Supp. 146 (U.S.D.C. 1981); *Berman, supra*. For that reason, we feel it is necessary as a matter of public policy to limit the damages recoverable in this type of action.

Of course, allowance of certain damages to compensate the parents is necessary to redress the harm done. We believe the appropriate balance is to allow the parents to recover damages only for the mental anguish which they have endured and will continue to endure as a result of the birth of the impaired child. As we

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stated earlier in this opinion, the impaired child may recover on his own behalf damages for the extraordinary expenses to be incurred during his lifetime as a result of his impairment, and the parents are entitled to disbursements from the child's recovery for the extraordinary expenses incurred by them in supporting and caring for the child. Therefore, the parents are compensated indirectly for these damages as well. In other words, we believe the parents' recovery, whether direct or indirect, should be limited because of policy considerations to those damages resulting directly from the child's impairment, and that the defendants should not be held liable for those damages or expenses which would ordinarily result from the birth of a normal, healthy child.

We conclude that the proposed cause of action for wrongful birth is legally cognizable under existing legal principles in this state and that the trial court correctly permitted the plaintiff parents here to proceed to trial on their claim.

As stated previously, at the close of the plaintiff parents' presentation of evidence at trial, the court directed verdicts in favor of each of the defendants. Plaintiffs contend this was error and that the evidence when considered in the light most favorable to them was sufficient to support a recovery against each defendant. It is well established that in considering a defendant's motion for a directed verdict, the plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976). "A directed verdict is improper unless it appears as a matter of law that plaintiff cannot recover under any view of the facts which the evidence reasonably tends to establish." *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E. 2d 90 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E. 2d 697, 698 (1984).

The plaintiff parents' claim is based on the alleged negligence of defendants Jean Dowdy and Dr. Dingfelder in the performance of their professional medical services. In order to withstand defendants' motions for directed verdicts, plaintiffs were required to offer evidence establishing the following: (1) the standard of care applicable to each individual defendant; (2) breach of the standard of care; (3) proximate causation; and (4) damages. *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E. 2d 566 (1981). If plain-

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tiffs failed to present sufficient evidence of any one of these elements, a directed verdict against them was proper.

A. The directed verdict in favor of Jean Dowdy

[7] The evidence with respect to defendant Jean Dowdy tends to show the following: On 13 March 1979, Mrs. Azzolino went to the Haywood-Moncure Clinic maintained by the corporate defendant OCCHS for treatment for an injured finger. While there, she had a pregnancy test performed which turned out to be positive. After learning that prenatal care was available at the Clinic, Mrs. Azzolino made return appointments to see family nurse practitioner Jean Dowdy and Dr. Dingfelder.

Mrs. Azzolino returned the following week and was examined by Jean Dowdy. Mrs. Azzolino testified that during the examination the following conversation took place:

On that prenatal visit I told Jean Dowdy that I would like to have amniocentesis. She looked at me kind of strange and asked why. I told her I was 36 and understand that there is a higher risk of having a Down's Syndrome child when you are 35 or over. She asked if I realized that it is a very dangerous procedure in that the technician, when he inserts the needle, can hit a baby's vital organ and that you can have a miscarriage and can bleed. She went on to say that when she was pregnant, she was concerned about a sickle cell trait and wanted to have an abortion, but her husband advised her that they should leave it in God's hands.

Mrs. Azzolino further testified that Jean Dowdy did not ask her to discuss amniocentesis with anyone else, nor did she inform Mrs. Azzolino of other places she could go to discuss it.

This conversation between Mrs. Azzolino and Jean Dowdy is the sole basis for the plaintiff parents' claim against Jean Dowdy. Plaintiffs contend Jean Dowdy was negligent in advising Mrs. Azzolino as she did and that her negligence was a proximate cause of their injuries. We disagree. Mrs. Azzolino testified that her conversation with Jean Dowdy did not affect her decision regarding amniocentesis and that she was still determined to have it after their conversation took place. Furthermore, Mr. Azzolino testified as follows:

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The first conversation my wife reported to me was the one she had with Jean Dowdy. That in no way affected my decision as to what we were going to do. I wanted her to talk to the doctor about it.

The evidence clearly shows that Jean Dowdy's alleged negligence did not influence Mr. and Mrs. Azzolino in any way in their decision to forego amniocentesis; therefore, the necessary causal connection between the alleged negligence and the plaintiffs' damages was not established. Since plaintiffs failed to show that the alleged negligence of Jean Dowdy was a proximate cause of their damages, the directed verdict in her favor was proper. *Accord*, *Weatherman v. White*, 10 N.C. App. 480, 179 S.E. 2d 134 (1971).

B. The directed verdict in favor of Dr. Dingfelder

First, we consider plaintiff's argument that Dr. Dingfelder may be held liable for the negligence of Jean Dowdy under the doctrine of respondeat superior. Assuming arguendo that the relationship between Dr. Dingfelder and Jean Dowdy was sufficient to justify application of this doctrine, plaintiffs could not prevail at trial based on this theory. The liability of the employer or master under the doctrine of respondeat superior cannot be in excess of that of the employee or servant. 8 Strong's N.C. Index 3d Master and Servant § 32 (1977). Since the evidence was not sufficient to support a verdict for plaintiffs against Jean Dowdy, the employee here, it was not sufficient to support a verdict for them against Dr. Dingfelder, the employer, based on this theory. For this same reason, we reject plaintiffs' argument that OCCHS is vicariously liable for the actions of Jean Dowdy.

Secondly, plaintiffs seek to hold Dr. Dingfelder liable based on his own negligence in advising Mrs. Azzolino concerning amniocentesis. G.S. 90-21.12 sets forth the standard of proof necessary to establish medical malpractice as follows:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health

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care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

The evidence with respect to Dr. Dingfelder tends to show the following: On 28 March 1979, Mrs. Azzolino returned to the Clinic and was examined by Dr. Dingfelder. During that visit, Mrs. Azzolino told Dr. Dingfelder that she would like to have amniocentesis. Mrs. Azzolino described Dr. Dingfelder's response to her statement and the advice she was given as follows:

[H]e asked me why I was worried about that. I told him that I hear that 35 and up you have a higher risk of having a Down's child and he told me not to be concerned with that, its (sic) 37 and up, not 35. . . . I was in the examining room around 10 minutes.

An examination was performed that day. Dr. Dingfelder asked me my age and I told him 36. I told him that I had been spotting and was concerned about that because that had never happened to me before. He asked me about, I guess, having trouble during my pregnancies. I really can't remember any specific questions that he asked me. He said nothing else about amniocentesis, nor did I say anything to him.

. . . I was not given any information on that day that indicated that there was a genetic counseling center at the University of North Carolina but discovered that there was a center there after my son was born.

. . . After my March 28 visit with Dr. Dingfelder, I had no further discussions with anyone there about amniocentesis.

Mrs. Azzolino continued to receive prenatal care at the Clinic for the remainder of her pregnancy. On 11 October 1979, she gave birth to Michael at North Carolina Memorial Hospital. The parties stipulated that Michael Azzolino was born with a permanent genetic defect known as Down's Syndrome which is characterized by mental retardation and other physical abnormalities.

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Mrs. Azzolino testified that shortly after Michael was born, Dr. Aylsworth, who was at the time assistant professor of pediatrics and director of the genetic counseling program at the University of North Carolina, and Dr. Dingfelder took her into a conference room to discuss Michael's condition. She described their conversation in part as follows:

. . . Dr. Aylsworth told me that they thought Michael might have Down's Syndrome and he asked me whether I had ever heard of amniocentesis and I told him "yes" and that I had asked Dr. Dingfelder who was sitting right there, for it and that he told me I didn't need it, that it was 37 and up. Dr. Aylsworth looked at Dr. Dingfelder and Dr. Aylsworth said "yes, but you were too late in your pregnancy to have it." Then I was hysterical . . . Dr. Dingfelder did not talk to me that day, he just patted my leg on the way out the door. He did not say anything to me.

Other evidence presented at trial tended to show that on 28 March 1979 when Mrs. Azzolino inquired about amniocentesis, she was not too far along in her pregnancy to have had amniocentesis and received the results of it back in time for her to have legally terminated her pregnancy.

The parties stipulated that in 1979 Dr. Dingfelder was a physician licensed to practice medicine in North Carolina and that he specialized in obstetrics and gynecology. Evidence was presented which showed that Dr. Dingfelder was on the faculty at the UNC School of Medicine, that he was on the staff at North Carolina Memorial Hospital (hereinafter "NCMH"), and that he served as a consultant one half day per week at the Haywood-Moncure Clinic where he saw gynecological and obstetrical patients and supervised the work of the family nurse practitioners there.

Paul Alston, project director for OCCHS, testified that the policy for genetic counseling at OCCHS was "to provide such information to enable patients to understand medical possibilities and to utilize counseling services available elsewhere." Dr. Phillip A. Buchanan, who was director of the Prenatal Counseling Clinic at NCMH and on the faculty at UNC School of Medicine in 1979, testified that his clinic would have provided a 36 year old pregnant woman with genetic counseling in 1979. He stated that in

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1979 his clinic offered amniocentesis for women under the age of 37 whose sole indication for amniocentesis was age if they had high concern about their risk of having a chromosomally abnormal baby after receiving a full explanation of what was involved with the procedure and its benefits and disadvantages.

Dr. Buchanan testified that it was in keeping with the policy at NCMH for an obstetrician not to recommend amniocentesis to a 36 year old woman with no other genetic indications if the patient, during a visit to the doctor's office, did not demonstrate high concern during the discussion. He defined "high concern" as "sufficient concern to have talked to their obstetrician or someone. . . ." He indicated that it was at age 35 or 36 that the risk of Down's Syndrome became medically significant and outweighed the risks associated with the procedure used to diagnose it. He stated that during 1977 through 1979 Dr. Dingfelder had referred patients to the Prenatal Counseling Clinic who were under the age of 37 where referral was made solely on the basis of high concern.

Dr. Aylsworth also testified about the policy of NCMH in 1979 with respect to genetic counseling and amniocentesis. He said the policy was as follows: "We recommend amniocentesis for women 37 and over and were willing to consider it for women 35 and 36 if they were very anxious and had really high concern." He later testified that if Dr. Dingfelder did not affirmatively recommend amniocentesis to Mrs. Azzolino, who was 36 at the time Michael was born, that Dr. Dingfelder's actions would have been in accordance with the policy of Chapel Hill at that time.

[8] Defendants argue that Dr. Dingfelder's actions should be evaluated in light of the standard of care applicable to other obstetricians and gynecologists with similar training and experience practicing in Haywood-Moncure or a similar medical community during 1979, and that because plaintiffs failed to present evidence of this standard of care, the directed verdict for Dr. Dingfelder was proper. We disagree. We believe the standard by which Dr. Dingfelder's actions should be judged is that applicable to other obstetricians and gynecologists with similar training and experience practicing in Chapel Hill or a similar community.

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As noted by Professor Robert G. Byrd in his article, "The North Carolina Medical Malpractice Statute," 62 N.C. L. Rev. 711, 713 (1984),

[A]doption of the same or similar community rule presumably reflects the belief, based in large part on the well-worn distinction between the country doctor and the big city doctor, that the quality of medical practice differs with the character of communities and that the standard of care, to be fair, must reflect this difference.

Although Dr. Dingfelder practiced one half day per week in Haywood-Moncure and provided medical care for Mrs. Azzolino in that community, his practice was based primarily in Chapel Hill as demonstrated by the fact that he was a professor at the UNC School of Medicine and on the staff at NCMH. Given the extensive nature of his affiliation with NCMH in Chapel Hill, we feel it is most appropriate to judge his actions by the standard applicable there.

[9] We believe the testimony of Dr. Buchanan and Dr. Aylsworth describing the policy at NCMH regarding amniocentesis and genetic counseling was sufficient to establish the standard of care applicable to Dr. Dingfelder. We further believe that the evidence viewed in the light most favorable to plaintiffs was sufficient to establish that Dr. Dingfelder breached that standard of care. The evidence could reasonably be interpreted as showing that Mrs. Azzolino expressed high concern about the risk that the child she was carrying had Down's Syndrome in that she raised the question of amniocentesis herself and indicated that she had already decided to have the procedure. That being the case and because Mrs. Azzolino was 36 years old at the time, the jury could have concluded that Dr. Dingfelder should have informed her of the availability of genetic counseling at NCMH and/or explained to her more fully and accurately of the risk that her child might have genetic defects; and that having failed to so advise her, he was in negligent violation of the accepted standard of care in the community in which he practiced.

The evidence was also sufficient to establish the remaining two elements of plaintiffs' case—proximate cause and damages. With respect to proximate cause, the evidence showed the following: Mrs. Azzolino testified that when she thought she might be

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pregnant, she and her husband decided to have amniocentesis because she was over 35. They had heard about amniocentesis through magazine articles and had discussed it in 1978 after Mrs. Azzolino's sister-in-law had it performed. They decided that if the test indicated a genetic defect, Mrs. Azzolino would have an abortion. Mrs. Azzolino admitted that very shortly after Michael was born, she told a doctor and social worker that she did not believe in abortion; however, the evidence shows that she had an illegal abortion in 1967 and an abortion in November, 1980.

Mrs. Azzolino testified that after her discussion with Dr. Dingfelder regarding amniocentesis, she had no more doubts about whether to have the procedure; that she had no further concern about having a child born with Down's Syndrome; and that what Dr. Dingfelder had told her had totally changed the decision that she and her husband had made more than a year earlier. Mr. Azzolino testified that he and his wife had decided that she would have amniocentesis if she got pregnant, and indicated they decided to forego amniocentesis because of Dr. Dingfelder's advice.

Dr. Buchanan testified that based on the data used in 1979, the genetic counseling center would have advised a woman who would have been 36 at the time of delivery that the risks associated with the amniocentesis procedure itself were between .5% and 1% whereas the risk that the woman, based solely on her age, would have a child with genetic defects was between .8% and 1%. Mrs. Azzolino stated that if she had been told there was a 50% chance of injury to the fetus occurring and a one in 2,000 chance of having a child with Down's Syndrome, she still would have had amniocentesis. The evidence further showed that the amniocentesis procedure was 99.6% accurate. We conclude that sufficient evidence was presented from which the jury could have found that had it not been for Dr. Dingfelder's negligence, Mrs. Azzolino would have had amniocentesis which would have shown that her fetus had Down's Syndrome; and that upon learning of the fetus' condition, she would have had an abortion. Therefore, the necessary causal connection was established.

With respect to damages, plaintiffs presented extensive evidence about Michael's impairment which showed the severity of his mental retardation and physical abnormalities, his need for ex-

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traordinary medical treatment, and his need for continued care for the rest of his life. Evidence was also admitted concerning the emotional distress suffered by Mr. and Mrs. Azzolino resulting from the fact Michael has Down's Syndrome. We conclude that sufficient evidence of damages suffered by Mr. and Mrs. Azzolino as a result of Dr. Dingfelder's negligence was presented to withstand the motion for directed verdict.

We hold that the evidence viewed in the light most favorable to plaintiffs established all the essential elements of plaintiffs' case; therefore, the entry of a directed verdict for Dr. Dingfelder was improper.

C. The directed verdict in favor of OCCHS

[10] Plaintiffs contend they presented sufficient evidence to support application of the doctrine of respondeat superior to hold OCCHS liable for the alleged negligence of Dr. Dingfelder. The doctrine of respondeat superior operates to make a principal vicariously liable for the tortious acts committed by his agent within the scope of his employment when the principal has the right to control the worker with respect to the manner and method of doing the work. *Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 686, 252 S.E. 2d 792, 795 (1979). Conversely, a principal is not vicariously liable for the tortious acts of an agent or worker who is not subject to interference or control by the principal with respect to the manner or method of doing the work. *Id.* "The controlling principle is that vicarious liability arises from the right of supervision and control." *Id.* The right to control is determinative regardless of whether it is exercised or not. 8 Strong's N.C. Index 3d Master and Servant § 3 (1977).

The primary question here is whether the evidence viewed in the light most favorable to plaintiffs was sufficient to show that Dr. Dingfelder was subject to interference or control by the defendant OCCHS with respect to the manner or method of performing his duties at the Haywood-Moncure Clinic. The only evidence presented relevant to this issue was the testimony of Mr. Alston, project director of OCCHS, regarding the contractual arrangement between OCCHS and the University of North Carolina pursuant to which Dr. Dingfelder worked at the Haywood-Moncure Clinic. Mr. Alston testified that the medical director, presumably either for OCCHS or the Haywood-Moncure Clinic,

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guided and supervised the physicians at the Clinic. We believe this was sufficient evidence from which it could be found that Dr. Dingfelder was subject to the supervision or control of OCCHS so as to justify the imposition of vicarious liability on OCCHS. We note that the evidence clearly shows that the alleged tortious acts of Dr. Dingfelder occurred within the scope of his employment at the Clinic. We hold the trial court erred in directing a verdict against plaintiffs in favor of defendant OCCHS.

VI

[11] Next, plaintiffs contend the trial court erred in granting defendants' motion for summary judgment on the issue of punitive damages and in striking from the complaint plaintiffs' prayer for such relief. G.S. 1A-1, Rule 56(c) permits the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." The courts of this state have generally held that punitive damages are recoverable where the tortious conduct which causes the injury is accompanied by an element of aggravation, as when the wrong is done wilfully or under circumstances of rudeness or oppression, or in a manner evincing a wanton and reckless disregard of the plaintiff's rights. *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978). "In cases where plaintiff's action was grounded on negligence, our courts have referred to gross negligence as the basis for recovery of punitive damages, using that term in the sense of wanton conduct." *Id.* at 106, 243 S.E. 2d at 150.

Plaintiffs argue that they are entitled to punitive damages because after the birth of Michael Azzolino, defendants attempted to hide their malpractice by "fabricating a trail of evidence" tending to show that when Mrs. Azzolino first asked the individual defendants about amniocentesis she was already too far along in her pregnancy to have had amniocentesis and received the results back in time for her to have had a legal abortion in North Carolina. In opposition to defendants' motion for summary judgment on this issue, plaintiffs filed two affidavits. One was the affidavit of Mrs. Azzolino in which she states that shortly after Michael's birth, Dr. Dingfelder failed to contradict or correct the statement

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of another physician to the effect that when Mrs. Azzolino inquired about amniocentesis she was too far along in her pregnancy to have had the procedure in time to have had a legal abortion; and that the dates on the medical records of her prenatal care at the Clinic are incorrect. In the second affidavit, a registered nurse states that she examined Mrs. Azzolino's medical records from NCMH which are supposed to be exact copies of the original medical records from the Haywood-Moncure Clinic and that she observed several distinct and easily identifiable differences in the contents of the two sets of records. The nurse concluded that in her experience such inconsistencies in medical records were not considered acceptable medical practice or ethically valid.

The injury suffered by plaintiffs in this case was allegedly caused by the individual defendants' failure to properly advise Mrs. Azzolino about the availability of genetic counseling and amniocentesis. Yet, the alleged conduct of defendants which serves as the basis for plaintiffs' claim for punitive damages occurred after Michael's birth and did not accompany the tortious conduct which caused plaintiffs' injury as required in order to sustain such a claim. For this reason, we hold that plaintiffs failed to set forth sufficient allegations to support a claim for punitive damages, and that the trial court's entry of summary judgment for defendants on this issue was proper.

VII

Lastly, plaintiffs assign as error the trial court's exclusion of certain evidence at trial. Because plaintiffs are entitled to a new trial, we do not feel it is necessary to address these contentions.

In conclusion, our holding is as follows: That part of the orders entered on 14 December 1982 dismissing the cause of action brought by Michael Azzolino for wrongful life is reversed. That part of the orders entered on 14 December 1982 dismissing the cause of action brought by the minor siblings of Michael Azzolino, Regina Mary Gallagher and David John Azzolino, is affirmed. That part of the judgment entered on 24 May 1983 allowing defendant Jean Dowdy's motion for directed verdict against the plaintiff parents is affirmed. That part of the judgment entered on 24 May 1983 allowing the motions of defendants Dr. James Dingfelder and Orange-Chatham Comprehensive Health Services, Inc. for directed verdicts against the plaintiff parents is reversed.

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The order entered on 6 May 1983 granting the defendants' motion for summary judgment on the issue of punitive damages is affirmed.

Affirmed in part; reversed in part.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. BEN WESTER, JR.

No. 846SC212

(Filed 20 November 1984)

1. Criminal Law § 22— no formal arraignment—no prejudice

Defendant's motion for arrest of judgment for failure of the court to formally arraign him in open court or to have him sign a written waiver was properly denied where defendant did not object or indicate that he was unaware of the charges against him or that he needed more time to prepare, the court informed the jury that defendant had pled not guilty, and defendant was not prejudiced by the lack of a formal arraignment.

2. Assault and Battery § 13— testimony about victim's return to work—no prejudice

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, a better foundation could have been laid for establishing that the victim did not go to work as scheduled and could not return to work until a week later due to his injuries, but the testimony taken as a whole did not prejudice the defendant.

3. Assault and Battery § 13— reference to "victim"—no error

There was no error in allowing a rescue worker to refer to "the victim" and the "cutting victim" where it was not contested that there was a victim of a serious attack, there was substantial testimony as to the brutality of the attack and its gory results, and there was no testimony that defendant was provoked into the attack.

4. Criminal Law § 50.2— medical opinion from rescue squad member—no error

The court properly admitted testimony from a rescue squad member that the victim was going into hypovolemic shock where the witness had been a member of the Enfield Rescue Squad for two years, had completed a full EMT course, had endured 121 hours of classroom work and 10 hours of actual emergency room training, and had recently completed 30 hours of training towards his recertification. He was better qualified to form an opinion on the victim's medical condition than the jury.

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5. Criminal Law § 71— reference to felony during questioning—shorthand statement of fact

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, a deputy's testimony that he had referred to "a felony [that] had occurred" when questioning defendant was merely a shorthand statement of fact and was therefore admissible.

6. Arrest and Bail § 3.1— warrantless arrest—probable cause

Defendant's warrantless arrest was lawful, and testimony and evidence surrounding the arrest was admissible, where the arresting officers had probable cause to believe that defendant had committed a felony or a misdemeanor and would flee before he could be apprehended if a warrant was first obtained. G.S. 15A-401(b)(2).

7. Assault and Battery § 14.3— assault with a deadly weapon with intent to kill inflicting serious injury—evidence sufficient

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant's motions for dismissal and a directed verdict, based on insufficient evidence of a serious injury, were properly denied where the evidence showed that defendant without provocation hit the victim with a Pepsi bottle hard enough to break the bottle, hit the victim with a second bottle which broke while the victim tried to get out of his van, attacked the victim with this broken bottle by slashing him on the neck, stabbed the victim in the eye with the jagged end of the bottle, hit the victim with his fist in the bleeding eye, and kicked the victim.

8. Criminal Law § 113.3— no instruction on defendant's failure to offer evidence—subordinate feature of the case—no request for instruction

The court did not err by not instructing the jury on defendant's failure to offer evidence where the subject was a subordinate feature of the case, defendant did not make a written request for a special instruction as required by G.S. 15A-1231, and the general subject was covered in the charge concerning defendant's failure to testify.

9. Assault and Battery § 16.1— no instruction on lesser degrees of offense—no error

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the court did not err by not instructing the jury on the lesser included offenses of misdemeanor assault with a deadly weapon, simple assault, and affray where the State's evidence was positive on each element of the crimes on which the jury was instructed, and there was no conflicting evidence as to the seriousness of the victim's injuries.

10. Assault and Battery § 16.1— failure to instruct on distinction between felony and misdemeanor assault—no prejudice

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err by refusing to explain the difference between felony and misdemeanor assault related crimes since the crimes of misdemeanor assault with a deadly weapon, simple assault, and affray did not arise on the evidence and did not have to be charged on.

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Moreover, defendant was not prejudiced by the court's instructions on "intent to kill" because he was not convicted of a crime involving intent to kill.

11. Criminal Law § 113.1— no recapitulation of the evidence—no error

The court did not err by not summarizing and recapitulating the evidence where the record shows no oral request or tender of a special instruction, the court indicated that it did not intend to recapitulate the evidence, the court asked if there were additions or corrections after delivering the charge, the instructions given applied the law to the facts, and the final mandate complied with the statute. G.S. 15A-1232.

12. Criminal Law § 138— PIN report of prior offenses

The court did not err by finding as an aggravating factor that defendant had a prior criminal record based on a Police Information Network computer printout of defendant's record from the District of Columbia. G.S. 15A-1340.4(e) provides that a prior record may be proven by certified court records or by stipulation, but they are not exclusive methods by which prior convictions may be shown.

13. Criminal Law § 138— aggravating factor—especially heinous, atrocious, or cruel offense—evidence sufficient

There was sufficient evidence to find as an aggravating factor that the crime was especially heinous, atrocious, or cruel where the evidence showed that defendant attacked the victim without provocation by striking him with two Pepsi bottles with enough force to break them, then stabbed the victim in the eye with the broken bottle, punched the victim in the bleeding area after he had fallen to the ground, and kicked the victim twice before walking away. G.S. 15A-1340.4(a)(1)f.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 8 June 1983 in Superior Court, HALIFAX County. Heard in the Court of Appeals on 19 October 1984.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Philip A. Telfer for the State.

Hux, Livermon & Armstrong by James S. Livermon, Jr., for defendant appellant.

BRASWELL, Judge.

While sitting in his van at Bellamy's Convenient Mart in Ringwood, North Carolina, William Allen Hales received cuts about his head and face when struck with two glass bottles by the defendant. The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury, but the

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jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. On appeal, the defendant's sixteen assignments of error can basically be divided into four categories: (1) arraignment, (2) admission of evidence, (3) jury instructions, and (4) sentencing.

On 9 April 1983, at approximately 9:30 p.m. William Allen Hales drove his van to Bellamy's Convenient Mart where he worked in order to get the store's keys and money so he could open the store the next morning. Hales went into the store and bought a ten-ounce Pepsi and some popcorn, then returned to his van to wait until he could get the money and the keys when the store closed. As he was waiting in the van with friends, Joe, Butterbean, and Rat, the defendant whom Hales had seen while inside came up to the driver's window and asked Hales for a ride down the road. When Hales refused, the defendant offered him money for the ride. Hales explained to the defendant that normally he would give him a ride for free, but that he could not that night because he was waiting for someone. Hales testified that he told the defendant that story because he did not want it known that he was waiting for the money from the store. The defendant indicated that he understood and walked away.

As Hales was talking to Butterbean who was sitting in the back of the van, the defendant went around to the front passenger's window where Joe was sitting. The defendant told Joe that Hales would not give him a ride. As Joe explained that usually Hales would have given him a ride, the defendant reached in the van, picked up the ten-ounce Pepsi bottle off the console between the seats, and threw it at Hales. When the bottle hit Hales' head, it broke and split open his head. Joe, Butterbean, and Rat made a break for the nearest door. As Joe got out by the front passenger's door, the defendant leaned into the van, found a second sixteen-ounce Pepsi bottle, and hit Hales with it. When Hales attempted to escape by the van's side door, the defendant grabbed his shirt and cut Hales on the back of the neck with the jagged end of the broken sixteen-ounce bottle. The defendant then stabbed Hales in the eye with the bottle, cutting a vein near Hales' eye. After further hitting and kicking Hales, the defendant released him and walked away. The rescue squad was called and Hales was taken to the hospital.

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ARRAIGNMENT

[1] The defendant contends that the trial court erred in denying the defendant's motion for an arrest of judgment for failure of the trial court to formally arraign the defendant in open court or for its failure to have the defendant sign a written waiver. In his brief the defendant states that he "is aware of cases handed down by this Court and by the North Carolina Supreme Court stating that it is not prejudicial error unless the defendant objects and states that he is not properly informed of the charges. This defendant specifically asks and requests this Court to overrule the previous decisions of this Court and the North Carolina Supreme Court on this point." We must decline this invitation. The defendant did in no way object or indicate that he was either unaware of the charges against him or that he needed more time to prepare. "Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *State v. Smith*, 300 N.C. 71, 73, 265 S.E. 2d 164, 166 (1980). Because the trial court informed the jury as a part of its charge that the defendant had pled not guilty, we fail to see how he was prejudiced by the lack of a formal arraignment. We hold the trial court properly denied the defendant's motion for an arrest of judgment.

THE EVIDENCE

The defendant asserts in five assignments of error that the trial court erred in allowing into evidence five items of testimony by three witnesses. Specifically, the defendant asserts that the trial court erred by admitting: (1) the victim's statement as to how long he was out of work following the attack; (2) the rescue squad member's reference to Hales as "the victim" and the "cutting victim"; (3) the rescue squad member's testimony as to the condition of the victim when he arrived at the scene; and (4) the statement made by the arresting officer to the defendant that he was investigating a felony.

[2] With regard to his first argument, the defendant objected to the admission of this evidence because a proper foundation had not been laid. Although from the record a hornbook foundation was not laid, we hold that any error committed by allowing this

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evidence was harmless. The defendant objected to the question: "When did you next go to work after this incident?" This objection was overruled and Hale answered "[a] week later." The only question to which the defendant has taken an exception in the record on appeal was: "When were you scheduled to go to work after this incident?" Hales had already answered this question by previously testifying that he was at the store that night to pick up the key for work the next day. This objected to testimony followed Hales' other testimony concerning the extent and treatment of his injuries. Although a better foundation could have been laid establishing the fact that Hales did not go to work as scheduled and could not return to work until a week later due to his injuries, the testimony taken as a whole did not prejudice the defendant.

[3] The defendant's assignment of error that the trial court improperly allowed Charles Carmen, rescue squad member, to refer to Hales as "the victim" and "cutting victim" is likewise without merit. It was not contested at trial that Hales was the victim of a serious attack. There was substantial testimony as to the brutality of the attack and its gory results. There was also no testimony that the defendant was provoked into attacking Hales. We hold it was not error to allow Carmen to refer to Hales as the victim.

[4] The defendant also contends that the trial court improperly allowed Carmen to express a medical opinion that Hales was going into hypovolemic shock without first formally being qualified as an expert witness. The opinion evidence of a non-expert witness is generally not admissible because it invades the province of the jury. "The basic question in determining the admissibility of opinion testimony, however, is whether the witness is better qualified through his training, skills, and knowledge, than the jury to form an opinion as to the particular issue." *State v. Wright*, 52 N.C. App. 166, 175, 278 S.E. 2d 579, 587, *disc. rev. denied*, 303 N.C. 319 (1981). Carmen testified that he had been a member of the Enfield Rescue Squad for two years, had completed a full EMT course, had endured 121 hours of classroom work and 10 hours of actual emergency room training, and had recently completed 30 hours of training towards his recertification. He was better qualified to form an opinion on Hales' medical condition than was the jury. We hold the evidence was properly admitted.

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[5] The defendant also objects to Deputy Sheriff Dan Stanfield's use of the word "felony" in his testimony. Stanfield testified that when he arrived at the defendant's home on the night of the assault that he found the defendant under a bed at his house, partially covered with a blanket. In response to the question, "What, if anything, did you do then?", the Deputy stated:

He wanted to know what we wanted. I told him we wanted to question him.

* * * *

I advised him on a question with reference to a felony had occurred.

Contrary to the defendant's assertion, this answer was not unresponsive and prejudicial to him. We hold that the Deputy's use of "felony" was merely a shorthand statement of the facts and was therefore admissible. *State v. Marlow*, 310 N.C. 507, 523-24, 313 S.E. 2d 532, 542 (1984).

[6] The defendant's next assignment of error contends that the warrantless arrest of the defendant was unlawful and the evidence and testimony surrounding the arrest was inadmissible. G.S. 15A-401(b)(2) provides that with regard to offenses committed out of his presence,

[a]n officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested. . . .

Deputy Stanfield had received information from the first officer on the scene that the defendant "had just come back in the area." Stanfield and other officers went to the defendant's parents' home and obtained permission to search the house. The record reveals that at the time of his arrest the officers did have probable cause to believe that the defendant had either committed a felony or that he had committed a misdemeanor and would flee before he could be apprehended if a warrant were first obtained.

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This assumption was well founded since the defendant did first attempt to leave by the back door when the officers came into the house before turning back and hiding under the bed. We hold the defendant's arrest was lawful and the testimony and evidence surrounding the arrest was admissible.

[7] In his next argument, the defendant contends that the trial court erred by denying the defendant's motion for a dismissal of the charges and for a directed verdict at the end of the State's evidence and then again at the end of all the evidence. The basis for this assignment of error is that the evidence presented does not tend to show that Hales received a serious injury as a result of this attack to constitute felonious assault. We must disagree.

It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom.

State v. Brown, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). Taken in the light most favorable to the State, the evidence reveals that the defendant without provocation hit Hales with a Pepsi bottle hard enough to break the bottle, hit Hales with a second bottle which broke while Hales tried to get out of the van, attacked Hales with this broken bottle by slashing him on the neck, stabbed Hales in the eye with its jagged end, hit Hales with his fist in the bleeding eye, and kicked him. Since there was substantial evidence that Hales' injuries were serious enough to constitute felonious assault, we hold the trial court properly denied the defendant's motions. See *State v. Smith*, *supra*, at 78-79, 265 S.E. 2d at 169.

JURY INSTRUCTIONS

[8] At the end of all the evidence, the trial court held a jury instruction conference out of the presence of the jury. At that time the defendant orally requested that numerous specific instructions be given to the jury.

In his first assignment of error with regard to jury instructions, the defendant contends that although the trial court did in-

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struct the jury regarding the defendant's failure to testify he erred by not also instructing the jury regarding the defendant's failure to offer evidence. Although the transcript shows an oral request of a general nature to charge "[a]s to the Defendant's failure to offer evidence," the record fails to contain any written request for a special instruction on the topic as required by G.S. 15A-1231 and as upheld in *State v. Harris*, 47 N.C. App. 121, 266 S.E. 2d 735 (1980), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 577 (1982). ("Requests for special instructions must be in writing and must be submitted before the beginning of the charge by the court." *Id.* at 123, 266 S.E. 2d at 737.) The judge is not required to compose the words of a request for a special instruction. Because the subject of a failure of a defendant to offer any evidence is a subordinate feature of the case, and because the general subject was adequately covered in the charge concerning the defendant's failure to testify himself, the failure of the judge to make up and give an instruction on the additional topic did not materially prejudice the case of the defendant. *See* G.S. 15A-1231(b). We find no error.

[9] The defendant's next three assignments of error stem from the trial court's failure to instruct the jury on the lesser included offenses of misdemeanor assault with a deadly weapon, simple assault, and affray. The trial court is not required to instruct the jury on every lesser included offense to the original crime charged unless such offenses arise on the evidence. In the present case, the State's evidence was positive as to each and every element of the crimes on which the jury was instructed. *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982). If the jury believed that the defendant was the person who feloniously assaulted Hales, the only other factual determination for them to resolve was whether the assault was committed with an intent to kill. Contrary to the defendant's argument, there was no conflicting evidence as to the seriousness of Hales' injuries to warrant an instruction of these lesser included offenses. "The '[m]ere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.'" *State v. McWhorter*, 34 N.C. App. 462, 467, 238 S.E. 2d 639, 641 (1977), *disc. rev. denied*, 294 N.C. 443, 241 S.E. 2d 844 (1978), *quoting State v. Hicks*, 241 N.C. 156, 160, 84 S.E. 2d 545, 547 (1954). "The defendant's contention that the jury might have convicted the defendant of the

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lesser included offense of assault with a deadly weapon [as well as simple assault and affray] if they had been given the opportunity does not support the submission of the lesser included offense[s] to the jury." *Id.* at 467, 238 S.E. 2d at 641-42. These assignments of error are overruled.

Furthermore, we note that the defendant's contention, labeled Assignment of Error No. 9, that the trial court should have also instructed the jury on the crime of assault with a deadly weapon with intent to kill, G.S. 14-32(c), was abandoned without argument in his brief. *See* Rule 28(b)(5), N.C. Rules App. Proc.

[10] Because these assignments of error are without merit, the defendant's next contention that the trial court erred by failing to define the elements of an assault and to distinguish felonious assault from misdemeanor assault is meritless. Since the crimes of misdemeanor assault with a deadly weapon, simple assault, and affray did not arise on the evidence and did not have to be charged on, the trial court did not err by refusing to explain the difference between the felony and misdemeanor assault-related crimes. Also, within this assignment of error, the defendant contends that the trial court erred in its jury instructions on "intent to kill" and what constitutes a "deadly weapon." We have carefully reviewed the charge and find no error in his instruction to the jury in this regard. Additionally, since the defendant was not convicted of a crime requiring the "intent to kill," we fail to see how he could have been prejudiced by the instructions given.

[11] The final assignment of error relating to jury instructions claims that the trial court erred "in refusing to summarize and recapitulate any of the evidence." There is no record of an oral request or written tender by counsel of a specific instruction on recapitulation of the evidence. However, in the court's conversation with counsel about a different request, the court volunteered the statement that "I do not intend to recapitulate the evidence."

After delivering the jury charge the court inquired: "Now do you have any corrections or additions to this charge?" Although an "off-the-record discussion" occurred at the bench, the transcript fails to disclose any requests for corrections or that any additional instructions were requested by defense counsel. We hold this assignment of error to be without merit.

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The statute, G.S. 15A-1232 does not require the trial judge in his charge to recite verbatim, repeat, recount, or recapitulate the testimony of each witness. Such repetition would be redundant to a juror's ears and lengthen jury instructions unnecessarily. We believe that the judge's duty is performed when he summarizes only so much of the evidence as is necessary for him to apply the law. *State v. Moore*, 31 N.C. App. 536, 542, 230 S.E. 2d 184, 187 (1976). Our review of the entire instructions as given to the jury reveals their application of the law to the facts. The final mandate of the charge here complied with the statute. See *State v. Norfleet*, 65 N.C. App. 355, 357-59, 309 S.E. 2d 260, 262-63 (1983).

SENTENCING

[12] In this assignment of error, the defendant contends that the trial court erred in finding two aggravating factors against the defendant and sentencing him to a term greater than the presumptive sentence. The defendant first asserts that the State's method of proving the defendant's prior criminal record was not in accordance with G.S. 15A-1340.4(e). The State introduced a PIN (Police Information Network) computer printout of the defendant's record from the District of Columbia. The defendant contends that the State was required to offer into evidence the defendant's prior criminal record by either stipulation of the parties or by a certified copy of the court record. We disagree and hold that the use of the PIN report to establish the defendant's prior criminal record was proper. G.S. 15A-1340.4(e) provides that a prior record may be proven by certified court records or by stipulation, but they are not exclusive methods by which prior convictions may be shown. *State v. Graham*, 309 N.C. 587, 593, 308 S.E. 2d 311, 316 (1983). As always, the defendant must be given the opportunity to refute the proffered evidence.

[13] The second aggravating factor objected to by the defendant was that this crime was "especially heinous, atrocious, or cruel." See G.S. 15A-1340.4(a)(1)f. The evidence shows that the defendant attacked Hales without provocation by striking him with two Pepsi bottles with enough force to break them. The defendant then stabbed Hales in the eye with the broken bottle and punched him in the bleeding area after Hales had fallen to the ground. Thereafter the defendant kicked Hales twice before walking away. We hold therefore that there was evidence to support the

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finding of this aggravating factor. Based on these two aggravating factors, the trial court did not err in imposing more than the presumptive sentence.

We hold the defendant's trial was without prejudicial error.

No error.

Judges WEBB and EAGLES concur.

THE LITTLE RED SCHOOL HOUSE, LIMITED, Z. H. HOWERTON, JR., TRUSTEE, PATRICIA A. BALLINGER, EMILY RUTH BALLINGER, AND MAX D. BALLINGER v. THE CITY OF GREENSBORO, A MUNICIPALITY, AND THE GREENSBORO CITY COUNCIL, THE GOVERNING BOARD OF THE CITY OF GREENSBORO

No. 8418SC80

(Filed 20 November 1984)

1. Municipal Corporations § 2.6— annexation—plans for water and sewer service—adequate

The report issued by the City in connection with its annexation of petitioners' property substantially complied with the requirements of G.S. 160A-47 concerning the provision of water and sewer services in the annexed areas.

2. Municipal Corporations § 2.2— annexation—use of area—description of subareas

Although the area sought to be annexed was broken into three subareas for determining under G.S. 160-48(c) and (d) whether the area was urban or connected urban areas, there is no authority requiring a precise description of the subareas, the Services Report prepared by the City contained a map clearly showing the outlines of the subareas, and petitioners have shown no material prejudice to their substantive rights resulting from their claimed ignorance of the boundaries of the subareas.

3. Municipal Corporations § 2.2— annexation—population density—evidence sufficient—use of preliminary census figures approved

The court's findings that the City had complied with statutory requirements in determining population and degree of land subdivision were supported by plenary evidence, and are therefore conclusive. The use of preliminary census figures was specifically sanctioned in *In re Durham Annexation Ordinance*, 66 N.C. App. 472. G.S. 160A-48(c), G.S. 160A-54.

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4. Municipal Corporations § 2— annexation—conduct of hearing—proper

The City conducted a proper hearing under G.S. 160A-49, despite petitioners' complaints that the mayor and council members were insufficiently attentive to the speakers, sometimes leaving their chairs and talking with each other, where the record reveals that the hearing was attended by more than 1,000 persons, that the hearing lasted five and one-half hours, ending at 1:00 a.m., and that numerous persons, including petitioners, were permitted to speak.

5. Municipal Corporations § 2— annexation procedure—proper

The City did not act arbitrarily, capriciously, or in an unreasonable manner in annexing the petitioners' property, and complied with the statutory requirements set out in G.S. 160A-47, 48, and 49.

6. Municipal Corporations § 2.3— annexation—compliance with statutory requirements

There was much competent evidence to support the finding that the City substantially complied with the requirements of G.S. 160A-48(e) respecting the boundaries of the annexation area as related to the petitioners' property.

7. Municipal Corporations § 2— annexation—no violation of equal protection or local act prohibition

The statutes governing annexation do not violate the petitioners' constitutional right to equal protection and do not violate the local act prohibition of the North Carolina Constitution.

8. Municipal Corporations § 2— annexation statute not a revenue bill

The annexation statute, Part 3 of Article 4A of Chapter 160A, as enacted and as applied by the City of Greensboro, was not a revenue bill required to be read three times in each house of the General Assembly.

9. Municipal Corporations § 2— annexation statutes not retroactive taxation statutes

The annexation statutes under which the City acted were not taxation statutes, and therefore were not retroactive taxation statutes. Art. I, § 16, North Carolina Constitution.

APPEAL by petitioners from *Seay, Judge*. Judgment entered 23 March 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 October 1984.

This is an appeal from a final judgment affirming an ordinance of annexation enacted by the Greensboro City Council on 16 November 1981. The record reveals the following:

On 1 October 1981 the City Council of Greensboro adopted a resolution announcing its intent to consider the annexation of three areas lying just outside the Greensboro city limits. On 19

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October the City Council received and approved an annexation report containing plans for extension of services to the areas being considered for annexation, pursuant to N.C. Gen. Stat. Sec. 160A-47. On 2 and 4 November 1981, following proper and timely notice, public hearings were held on the proposed annexation. On 16 November the ordinances of annexation were enacted by the City Council. On 17 December 1981 two groups of persons owning property in the areas annexed filed petitions seeking judicial review of the annexation ordinances in Superior Court, pursuant to N.C. Gen. Stat. Sec. 160A-50. The two appeals were heard and tried together in superior court. On 23 March 1983 the superior court entered judgment affirming the ordinances appealed from. Both groups of property owners appealed Judge Seay's decision to this Court. On 4 September 1984 this Court affirmed Judge Seay's decision, insofar as it related to one group of property owners in *Campbell v. City of Greensboro*, 70 N.C. App. 252, 319 S.E. 2d 323 (1984). The instant appeal is that taken by the second group of petitioners, all of whom own property in "Area M"—one of the three areas annexed. The questions presented on this appeal thus relate solely to that part of Judge Seay's order pertaining to Ordinance 81-106, authorizing annexation of that property hereinafter referred to as Area M.

Max D. Ballinger for petitioners, appellants.

Dale Shepherd and Linda A. Miles for respondent, appellee.

HEDRICK, Judge.

[1] By Assignments of Error Nos. 2, 7, 11, and 23, petitioners contend that the trial court erred in determining that the City of Greensboro complied with N.C. Gen. Stat. Sec. 160A-47 in connection with the provision of water and sewer services to the annexed area. G.S. 160A-47 in pertinent part provides:

A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall . . . prepare a report setting forth such plans to provide services to such area. The report shall include:

(1) A map . . . of the municipality and adjacent territory to show the following information:

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. . .

b. The present major trunk water mains and sewer interceptors and outfalls, and the proposed extensions of such mains and outfalls. . . .

. . .

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

. . .

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed. . . .

c. If extension of major trunk water mains and sewer outfall lines into the area to be annexed is necessary, set forth a proposed timetable for construction of such mains and outfalls as soon as possible following the effective date of annexation.

Our appellate courts have discussed G.S. 160A-47 on several occasions. In *In re Annexation Ordinance*, 304 N.C. 549, 284 S.E. 2d 470 (1981), our Supreme Court said:

The central purpose behind our annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents receive the benefits of all the major services available to municipal residents. [Citations omitted.] The minimum requirements of the statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. . . . We believe that the report need contain only the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services.

Id. at 554-55, 284 S.E. 2d at 474.

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In the instant case, the Report prepared by the City pursuant to G.S. 160A-47 contains the following plans concerning water and sewer services:

I. *City Water Service*—Water service will be provided in accordance with City ordinances and policies applicable at the time extensions are made. Preparation of plans and specifications will begin prior to the effective date of annexation. Contracts will be let and construction begun within one year after the effective date of annexation on all major water lines to serve the areas involved, as required by State law. (Exhibits L, M and N).

Water service to all public streets in the areas to be annexed will be extended on the same basis as is now used in the existing city. Service is extended upon receipt of a petition from more than 50 percent of the number of property owners on a street, who collectively own more than 50 percent of the property frontage on the street. The City Council may also extend services, without such a petition, on the basis of public necessity. In either case the property owner is assessed at a specified maximum rate with the rate not to exceed the cost of a six inch line.

The cost of installation for major lines will be financed by appropriation from the water construction account in the Water and Sewer Operating Fund. Assessments levied for these lines will be used to install additional lines with the difference between cost of installation of lines and cost assessed being made up from current revenues from water and sewer charges. The estimated cost for extending major water lines is \$715,000.

J. *City Sewer Service*—City sewer service will be provided in accordance with City ordinances and policies applicable at the time extensions are made. Preparation of plans and specifications for major sanitary sewer outfalls, collectors and any lift stations will begin prior to the effective date of annexation. Contracts will be let and construction begun on these facilities within one year after the effective date of annexation as required by State law. (Exhibits O, P and Q).

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Exhibits O, P and Q identify major sanitary sewer outfalls, collectors and lift stations that are existing and/or necessary to serve the annexation areas. The Horsepen Creek project, which is indicated on Exhibits P and Q, is a Federal, State and County approved and funded project. Bids are scheduled to be received on November 5, 1981, with construction anticipated to begin by Spring of 1982 and completion by Fall of 1983.

Sewer services to all public streets in the areas will be extended upon the same basis as is now used in the existing city. Service is extended upon receipt of a petition from more than 50 percent of the number of property owners, who collectively own more than 50 percent of the property frontage on a street. The City Council may also extend service without such a petition on the basis of public necessity. In either case the property owner is assessed at a specified maximum rate with the rate not to exceed the cost of an eight inch line.

The cost of installation for sewer outfalls, collectors and lift stations, will be financed by appropriation from the sewer construction fund in the Water and Sewer Operating Fund. Assessments levied for these lines will be used to install additional lines with the difference between cost of installation of the lines and cost assessed being made up from current revenues from water and sewer charges. The estimated cost of extending major sewer lines is \$235,000.

Also included in the Report are maps showing existing and proposed water mains and sewer lines in Area M. We think it clear that the Report prepared by the City substantially complies with the statutory requirements. Petitioners' attempts to distinguish plans to provide water from plans to provide water trunk lines, and their contentions regarding probable accelerated growth in Area M are of no avail, and we hold they have failed to carry their burden of demonstrating the City's noncompliance with G.S. 160A-47.

[2] Petitioners next assign error to the court's "findings of fact and conclusions of law that the character of the area sought to be annexed met the requirements of G.S. 160A-48(c) and G.S. 160A-48(d)." N.C. Gen. Stat. Sec. 160A-48(c) requires that "[p]art or all of the area to be annexed must be developed for urban pur-

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poses,” and sets out three standards by which compliance with this requirement is to be measured. N.C. Gen. Stat. Sec. 160A-48(d) provides for the inclusion of areas not developed for urban purposes “which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.”

In connection with compliance with G.S. 160A-48(c) and (d), Judge Seay made detailed findings of fact to the following effect: Area M is divided into subareas M-1, M-2, and M-3. Subareas M-1 and M-3 meet the requirements of G.S. 160A-48(c)(1), each having a resident population exceeding two persons per acre. Subarea M-2 does not meet the requirements of G.S. 160A-48(c), and thus is not an “area developed for urban purposes,” but does fully comply with the requirements of G.S. 160A-48(d), having 74.9% of its external boundary adjacent to the boundaries of the municipality and subareas M-1 and M-3.

Petitioners challenge the court’s findings and conclusions on two grounds: first, they contend “[t]he sub-areas M-1, M-2, and M-3 were, and remain, totally undescribed.” We reject petitioners’ contentions in this regard for three reasons. First, we are aware of no authority, and petitioners cite none, requiring the City to provide a precise description of subareas considered for annexation. Second, Exhibit E contained in the Services Report prepared by the City is a map of Area M clearly showing the outlines of the subareas. Finally, we note that petitioners have shown no material prejudice to their substantive rights resulting from their claimed ignorance of the boundaries of the subareas.

[3] Petitioners next contend that “the population figures used by the City for that nebulous area of M-1 were overstated by 640 persons,” resulting in an average resident population of less than two persons per acre, disqualifying subarea M-1 for annexation under G.S. 160A-48(c).

G.S. 160A-54 in pertinent part provides:

In determining population and degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in G.S. 160A-48 have been met on appeal

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to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of the municipality:

(1) As to population, if the estimate is based on the number of dwelling units in the area multiplied by the average family size in such area, or in the township or townships of which such area is a part, as determined by the last preceding federal decennial census; or if it based on a new enumeration carried out under reasonable rules and regulations by the annexing municipality; provided, that the court shall not accept such estimates if the petitioners demonstrate that such estimates are in error in the amount of ten percent (10%) or more.

Judge Seay made detailed findings of fact and conclusions of law in regard to the methods used by the City to determine the population in the annexed areas, including the following:

14. As part of the method used by the City in determining the population in the annexed areas, the City used the number of dwelling units in those areas multiplied by the persons per dwelling unit, as determined by calculations from the preliminary Census Bureau counts of population in the annexed areas. In doing so the City used figures and information gathered by officials from the United States Census Bureau.

. . .

In making the determination of whether there were at least two persons per acre in the annexed areas, the City used the Census Bureau's information contained in the Preliminary 1980 Census Computer Printout in Guilford County, which contained population data on the enumeration district level, which was the smallest area for which population and housing data was available. This method of determining persons per dwelling unit was used because it was the most accurate method possible to be sure that the population figures were correct.

. . .

The Court finds that the methods used to determine the acreage, population, number of dwelling units, and number of

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persons per acre comply with the requirements of the statute. . . .

. . .

3. That the method used by the City of Greensboro in determining the usage and population of the annexed areas is legal and proper and within the standards required by G.S. 160A-48 and G.S. 160A-54.

It is elementary that the trial court's findings of fact are conclusive if supported by any competent evidence, even though contrary evidence is also presented. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). In the instant case the City offered plenary evidence tending to show full compliance with the statutory requirements, and which amply supports the court's findings of fact. Petitioners' attempts to impeach this evidence were obviously not found credible by the trial court. We note in particular, in response to repeated complaints in petitioners' brief about the City's use of preliminary census figures, that reliance on preliminary census figures was specifically sanctioned by this Court in *In re Durham Annexation Ordinance*, 66 N.C. App. 472, 311 S.E. 2d 898 (1984). We find no error in the findings of fact and conclusions of law challenged by petitioners in these assignments of error.

[4] Petitioners next contend the annexation ordinance should be vacated due to the City's failure to comply with the statutory procedures set out in G.S. 160A-49. Specifically, petitioners contend that the public hearing, required by G.S. 160A-49 and conducted by the City on 2 and 4 November, 1981, "was a mere formality," and a "ceremonial assemblage misnamed a 'hearing.'" Petitioners complain that the mayor and Council members were insufficiently attentive to the speakers at the 4 November hearing, sometimes leaving their chairs and talking with each other. The record reveals that the 4 November hearing was attended by more than 1,000 persons, that the hearing lasted some five and one half hours, ending at 1:00 A.M., and that numerous persons, including petitioners, were permitted to speak. Petitioners' contentions in connection with this assignment of error approach absurdity.

[5] Petitioners next argue that the City acted "arbitrarily, capriciously, or in an unreasonable manner in annexing the peti-

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tioners' property so as to produce unfair and inequitable results not in keeping with legislative intent." While petitioners make reference to a number of entirely irrelevant facts in the portion of their brief discussing this question, careful scrutiny reveals that the gist of their argument is that the City failed to comply with the statutory requirements set out in G.S. 160A-47, -48, and -49. We have upheld the trial court's determination that there was substantial compliance with the statutory requirements, and thus find these assignments of error without merit.

[6] By Assignments of Error 18 and 23, petitioners argue the court erred in concluding that the City had complied "with the requirements of 160A-48(e) respecting boundaries of the annexation area as relates to these petitioners' property." The issue argued by petitioners was decided in *Campbell v. City of Greensboro*, 70 N.C. App. 252, 319 S.E. 2d 323 (1984), a case involving an appeal by other property owners in the annexed areas from the same judgment as that appealed from by petitioners in the instant case. In *Campbell* this Court held that there is "much competent evidence" to support the findings of fact, which in turn support the conclusion that the City substantially complied with G.S. 160A-48(e). The assignments of error are thus overruled.

[7] By Assignments of Error Nos. 12, 1, 23, and 13, petitioners contend that certain portions of the statutes governing annexation are unconstitutional, in that they "violate the petitioners' constitutional right to equal protection of the laws" under the United States and North Carolina Constitutions, and that they "violate the local act prohibition" contained in the North Carolina Constitution. In support of these assignments of error, petitioners purport to "incorporate into their brief and adopt the argument on this question presented in the Campbell petitioners' brief as their argument on this particular question." Assuming *arguendo* that such a practice is permissible under the Rules of Appellate Procedure so as to preserve petitioners' right to have this question considered on appeal, we note that this Court rejected identical contentions in *Campbell*, and we are bound by its ruling in this regard. *Id.* at 254, 319 S.E. 2d at 325.

[8] Petitioners next argue that the court erred "in failing to find as fact and determine as a matter of law that the annexation statute, Part 3 of Article 4A of Chapter 160A, as enacted and as

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applied by the City of Greensboro was a revenue bill and violative of Article II, Section 23, of the North Carolina Constitution in that it was not passed in accordance with the constitutional provisions for the enactment of revenue bills." In brief, petitioners contend that the annexation statute was subject to the constitutional requirement, applicable to the enactment of revenue bills, that the proposed statute be read three times in each house of the General Assembly, that these statutes were not so read, and that Chapter 160A, Article 4A, Part 3, is void. The same argument was unsuccessfully made to our Supreme Court in 1908 in a case involving an extension of the Fayetteville municipal boundaries. *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758 (1908). The argument has not improved with age. The assignment of error is without merit.

[9] Petitioners next contend that the court erred "in determining as a matter of law that the annexation statutes under which the City of Greensboro purported to annex were not in the nature of retrospective taxation statutes prohibited by Article 1, Section 16, of the North Carolina Constitution." Having ruled that the annexation statutes are not taxation statutes, it follows that they are not "retrospective taxation statutes." See *Matthews v. Blowing Rock*, 207 N.C. 450, 177 S.E. 429 (1934); *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758 (1908). The assignment of error is without merit.

Petitioners' remaining assignments of error are based on the premise that the court erred in one of the numerous rulings discussed above. Having found no error in these rulings, we find it unnecessary to discuss these assignments of error. The judgment appealed from is in all respects affirmed.

Affirmed.

Judges WEBB and HILL concur.

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STATE OF NORTH CAROLINA v. ANTONIO GOODMAN

No. 8426SC15

(Filed 20 November 1984)

1. Burglary and Unlawful Breakings § 5— attempted first degree burglary—sufficiency of evidence

The State's evidence was sufficient to permit inferences of an attempt to enter and intent to commit larceny so as to support defendant's conviction of attempted first degree burglary where it tended to show that defendant climbed onto an awning and removed a corner of a window screen of an occupied apartment in the nighttime and that defendant fled when confronted by a neighbor of the apartment's occupant. G.S. 14-51.

2. Criminal Law § 163— failure to instruct on lesser offense—absence of objection—no plain error

Defendant could not assign as error the failure of the trial court to instruct on a lesser included offense where defendant failed to object to the instructions and submitted no proposed instructions prior to jury deliberations as required by App. Rule 10(b)(2). Furthermore, failure of the trial court to submit the lesser offense did not constitute plain error.

3. Burglary and Unlawful Breakings § 5— first degree burglary—intent to commit larceny—sufficiency of evidence

The State's evidence was sufficient for the jury to infer an intent to commit larceny so as to support defendant's conviction of first degree burglary where it tended to show that defendant stuck his hand through the kitchen window of an occupied apartment in the nighttime and knocked over salt and pepper shakers on the windowsill, and that a chair which was usually kept pushed under a table was turned on its side below the window. Evidence tending to show that defendant was fleeing from police officers and may have been seeking a place to hide merely presented a jury question as to defendant's intent.

4. Burglary and Unlawful Breakings § 5.6— breaking and entering of motor vehicle—intent to commit larceny—sufficiency of evidence

The State's evidence was sufficient for the jury to infer an intent to commit larceny so as to support defendant's conviction of felonious breaking and entering of a motor vehicle where it tended to show that defendant was lying face down on the floorboard of the vehicle when police took him into custody, and that defendant had in his possession the vehicle registration and hubcap key which he had taken from the glove compartment.

5. Burglary and Unlawful Breakings § 8; Criminal Law § 138— presumptive sentence for first degree burglary

In the absence of any aggravating or mitigating factors, the trial court was required to impose the presumptive term of 15 years for first degree burglary. The defendant in this case was not prejudiced when the trial court referred to the "presumptive term" as the "minimum term." G.S. 14-52.

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APPEAL by defendant from *Burroughs, Judge*. Judgments entered 22 July 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 September 1984.

This is a criminal case in which defendant was convicted at a jury trial of attempted first degree burglary, first degree burglary and breaking and entering into a motor vehicle as a result of three separate incidents occurring on the night of 7 April 1983.

The State's evidence tended to show that defendant was observed trying to remove a window screen from an apartment at 205 Judson Avenue in Charlotte which was occupied by Ms. Bernice Cole. Defendant loosened one corner of the window screen and was confronted by a neighbor who lived at 203 Judson Avenue. Defendant jumped down from the window and ran across the street. Defendant then went behind the apartment at 202 Judson Avenue. According to a State's witness, defendant put his hand through a kitchen window knocking over salt and pepper shakers. He fled when she screamed.

Later several Charlotte police officers found defendant hiding in an automobile belonging to Mattie Boger which was parked nearby on Judson Avenue. Upon a search incident to the arrest, the automobile registration and hubcap key from the automobile was found in defendant's possession.

Defendant's evidence tended to show that defendant was in his father's restaurant until approximately 10:30 p.m. at which time he left with his girl friend, Lavern Cowens. Defendant's sister had asked him to deliver some medicine to their aunt, but Ms. Cowens wanted him to take her home first. Defendant and Ms. Cowens walked to her grandmother's apartment on Zebulon Avenue where they stopped long enough for defendant to eat a sandwich. Defendant and Ms. Cowens then went to a friend's apartment on the corner of Judson and Zebulon Avenues at about 10:50 p.m. Ms. Cowens waited there for defendant to deliver the medicine to his aunt. Ms. Cowens testified that defendant walked down Judson Avenue in the direction of the restaurant and went behind the apartments in the same direction from which they had recently traveled. Ms. Cowens next observed the police apprehend defendant next to one of the apartments. Defendant was sentenced to three years in prison for attempted first degree

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burglary, fifteen years in prison for first degree burglary, and two years in prison for breaking and entering a motor vehicle. Defendant appeals.

Attorney General Edmisten, by Tiare B. Smiley, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Robin E. Hudson, for the defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the sufficiency of the evidence upon which the jury based its guilty verdict as to the charge of attempted first degree burglary. We find no error.

The basis of defendant's argument is that where the State's evidence tended to show that defendant merely loosened the corner of a window screen, there was insufficient evidence to convince a jury beyond a reasonable doubt that there was an entering or intent to commit larceny, required elements of the crime of attempted first degree burglary. We disagree.

Burglary is defined in North Carolina by the common law and G.S. 14-51, as the breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with intent to commit a felony therein, whether such intent be executed or not. *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976); *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975). An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. *State v. McAlister*, 59 N.C. App. 58, 295 S.E. 2d 501 (1982), *cert. denied* 307 N.C. 471, 299 S.E. 2d 226 (1983); *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949).

It is uncontroverted that one corner of a window screen was removed. This is sufficient to constitute a breaking. The apartment involved was the dwelling house of Bernice Cole and the breaking took place in the nighttime. As to the disputed elements of intent to enter and intent to commit a felony therein, we first examine the element of entry.

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The State's evidence tended to show that defendant "broke the close of the dwelling place" by removing a peg holding the window screen to the rear window of the apartment and loosening the corner of the window screen. A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982).

We note that defendant's acts of climbing up onto the awning over the back porch, pulling out the peg and loosening the window screen, constitute convincing circumstantial evidence that defendant intended to break and enter.

When the sufficiency of circumstantial evidence is called into question, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts taken singularly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In considering the factual circumstances of defendant's climbing an awning and removing a corner of a window screen, the jury did not err in concluding that there was an intent to break and enter the apartment of Bernice Cole.

We next consider the element of intent to commit a felony. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question. G.S. 14-51. The jury found in this case that defendant attempted to break and enter the occupied dwelling of Bernice Cole, in the nighttime with the intent to commit larceny.

The basis of defendant's argument that there was insufficient evidence from which a jury could find beyond a reasonable doubt that defendant intended to commit larceny is that the jury had to base an inference upon an inference to reach such a conclusion. We disagree.

It is well settled that a basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based upon inference. Every inference must stand upon some clear and direct evidence, and not upon some presumption. *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983). Defendant

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argues that since there is an inference of intent to enter based upon the direct evidence of a breaking by removal of a corner of the window screen, the element of intent to commit larceny is a further inference based upon the inference of intent to enter. This argument is without merit.

In *State v. McBryde*, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887) and in *State v. Sweezy*, 291 N.C. 366, 384, 230 S.E. 2d 524, 535 (1976) our Supreme Court reasoned

The intelligent mind will take cognizance of the fact that people do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation of evidence of a different intent, the ordinary mind will infer this also. The fact of entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

The State submits, and we agree, that the usual and reasonable inference of an intent to steal is no less under the circumstances of an attempted burglary than of a successful burglary itself. There was direct evidence of the breaking and flight upon discovery. Under the facts here there need not be an actual entry to permit an inference of larcenous intent. There are no facts or circumstances which suggest other than a larcenous intent. The State is entitled to the reasonable inferences which can be drawn from the evidence, whether the evidence is direct, circumstantial or both. There is substantial direct and circumstantial evidence of all of the essential elements of attempted first degree burglary, including the elements of entry and intent to commit larceny. This evidence is sufficient to support the trial court's denial of defendant's motion to dismiss and the jury's verdict of guilty as to attempted first degree burglary.

II

[2] Defendant next assigns as error the trial court's failure to instruct the jury as to attempted misdemeanor breaking or entering. This issue is not properly before us.

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Rule 10(b)(2), Rules of Appellate Procedure, provides that no party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict.

Our reading of the record shows that a charge conference was held by the trial court with counsel concerning jury instruction. The trial court unequivocally informed defendant that the court would only instruct the jury on possible verdicts of attempted first degree burglary or not guilty. The trial court also asked defendant if he wanted anything else included in the instruction or if he had any written requests for instructions. Defendant stated that he had no written instructions and understood that this was the time to make any requests. Defendant did not object to the jury instructions and did not tender any written, proposed instructions prior to the jury deliberations. Defendant's purported objection to the trial court's omission of an attempted misdemeanor breaking or entering instruction first appears on appeal. For this reason, Rule 10(b)(2) forbids us to consider this assignment of error. We have, however, examined the entire record for plain error as contemplated by our Supreme Court's decision in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Based upon our examination of the record, we cannot say that the trial court's omission of an attempted misdemeanor breaking or entering instruction rises to the level of plain error.

III

[3] Defendant next assigns as error the sufficiency of the evidence as to his conviction of first degree burglary. We find no error.

The State's evidence tended to show that after leaving Ms. Cole's apartment at 205 Judson Avenue, defendant appeared at the apartment of Janice Blackmon at 202 Judson Avenue. Ms. Blackmon observed defendant sticking his hand through her kitchen window, knocking over a salt and pepper shaker on the windowsill. Ms. Blackmon also observed that a chair, usually kept pushed under a table, was turned on its side below the window in question.

Defendant argues that there can be no inference to commit larceny in this case because defendant was obviously fleeing from

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police officers and was merely seeking a place to hide. We disagree.

The question of defendant's intent to commit larceny was for the jury. The inference of an intent to commit larceny is proper where there is proof beyond a reasonable doubt of an entry. *State v. McBryde, supra, State v. Sweezy, supra*. Our Supreme Court has held that sticking one's hand through an open window is an entry. *State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979).

After careful examination of the record, we hold that there was sufficient evidence from which the jury could find an intent to commit larceny in the Blackmon apartment. The trial court did not err in denying defendant's motion to dismiss the charge of first degree burglary.

IV

[4] Defendant next assigns as error the sufficiency of the evidence as to his conviction for breaking and entering a motor vehicle. We find no error.

The basis of defendant's argument again is that defendant sought only to hide from police and had no intent to commit larceny when he broke and entered the motor vehicle in question. We disagree.

Again the question of defendant's intent was for the jury. There is evidence, direct and circumstantial, from which a jury could find the defendant guilty of breaking and entering a motor vehicle.

It is only necessary to establish the intent to commit larceny in order to establish a felonious breaking or entering of a motor vehicle. *State v. Kirkpatrick*, 34 N.C. App. 452, 238 S.E. 2d 615 (1977). It is not necessary to take anything from the vehicle to support a conviction. *State v. Quick*, 20 N.C. App. 589, 202 S.E. 2d 299 (1974). Here we have more than mere entry into the vehicle in question. When defendant was removed from the vehicle, he had in his possession the registration card and hubcap key for the vehicle.

While it is true that defendant was lying face down on the floorboard of the automobile, apparently hiding, when police took him into custody, he had already obtained the registration card

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and hubcap key from the glove compartment. Moreover, at the time defendant ran from the second apartment (at 205 Judson Avenue), the police had not yet begun to arrive on Judson Avenue. An attempt to hide from police, though reasonable, is not the only conclusion a jury could reach based on the facts of this case. When viewed in the light most favorable to the State, there was sufficient evidence in the record as a whole from which the jury could find an intent to commit larceny when defendant broke and entered the vehicle in question. The trial court did not err in denying defendant's motion to dismiss.

V

[5] Defendant finally assigns as error the imposition of the presumptive sentence of fifteen years for the conviction of first degree burglary. We find no error.

The presumptive term for first degree burglary (G.S. 14-52; Class C felony) is fifteen years. In imposing the presumptive term, the trial court, after noting the "presumptive term" was fifteen years, then went on to say that the "minimum term" was fifteen years. We note that the trial court made no written findings as to aggravating or mitigating factors in imposing the presumptive term. In the absence of any aggravating or mitigating factors, our Fair Sentencing Act requires the imposition of the presumptive term when a prison term is imposed, as it was in this case. Further, notwithstanding the Fair Sentencing Act, G.S. 14-52 prohibits the trial judge to suspend a sentence or place a defendant on probation for this offense. Even if mitigating factors had been found and even if they outweighed the aggravating factors in this case, the absolute minimum prison term to which this defendant could have been sentenced was fourteen years. G.S. 14-52. While it is unfortunate that the trial court also referred to the "presumptive term" as the "minimum term" we cannot say that the defendant was prejudiced thereby. The trial court correctly applied the terms of the Fair Sentencing Act and G.S. 14-52 to this case.

For all of the foregoing reasons, we find no error.

Judges WEBB and BRASWELL concur.

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NEIL EVANS SMITH AND WIFE, ALICE M. SMITH v. JACK A. WATSON AND
WIFE, PHYLLIS B. WATSON

No. 8413DC170

(Filed 20 November 1984)

**1. Appeal and Error § 6.2— order granting summary judgment on liability but
reserving damages for trial—not appealable—heard in discretion of the court**

Although an order granting summary judgment on the issue of liability and reserving the issue of damages for trial is not immediately appealable, the Court of Appeals in its discretion considered such an appeal when the order included a permanent injunction.

**2. Tenants in Common § 3; Deeds § 19.3— assignment of pier rights—exclusive
right in one tenant in common—restrictive covenant**

Where the developer of property sold a lot to defendants, transferred an undivided one-half interest in a beach area to defendants, then executed an Assignment of Pier Rights which transferred the developer's pier rights to defendants, subject to the right of the purchaser of an adjoining lot to use any pier constructed with the right to build a boat stall reserved to defendants, and the developer subsequently sold the adjoining lot to plaintiffs, the Assignment of Pier Rights can either be considered an agreement between tenants in common giving one tenant in common the right to exclusive use of part of the property, or a covenant running with the land.

**3. Registration § 1— assignment of pier rights—not effective without registra-
tion**

An Assignment of Pier Rights which was either an agreement concerning exclusive use by tenants in common or a covenant restricting the use of a boat stall was not binding on subsequent purchasers for value because of defendants' failure to record the instrument prior to plaintiffs' acquisition of the land. N.C.G.S. 47-18.

**4. Registration § 3— assignment of pier rights—actual notice immaterial if not
recorded**

Where defendants failed to record an Assignment of Pier Rights prior to plaintiffs' acquisition of the land, actual notice to plaintiffs will not defeat the requirement that property interests be recorded to be binding on subsequent purchasers.

**5. Rules of Civil Procedure § 31— motion to amend answer denied—no abuse of
discretion**

The trial court did not abuse its discretion by not permitting defendants to amend their answer to assert the three year statute of limitations for personal property claims because the action, involving an Assignment of Pier Rights, was not an action to recover personal property.

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APPEAL by defendants from *Gore, Judge*. Judgment entered 23 September 1983 in District Court, BLADEN County. Heard in the Court of Appeals 13 November 1984.

This is a civil action wherein plaintiffs, husband and wife, seek to have defendants, husband and wife, ejected from exclusive use of a boat stall which is part of a pier owned by plaintiffs and defendants as tenants in common. Plaintiffs also ask that defendants be permanently enjoined from usurping plaintiffs' rights in the boat stall, that they be awarded damages in the amount of \$4,000, and that a certain document entitled "Assignment of Pier Rights" be declared null and void. In their complaint, filed 5 April 1982, plaintiffs made allegations that, except where quoted, are summarized as follows:

On 23 February 1978 plaintiffs purchased from J. Michael Starling and Linda P. Starling a one-half undivided interest in a parcel of land that abuts the high water mark of White Lake. Defendants had acquired a one-half undivided interest in the same property from the Starlings on 9 December 1977. Both deeds were recorded. Following acquisition of the property, plaintiff Neil Smith and defendant Jack Watson applied to "the appropriate agency of the State" for a permit to build a pier extending from the parcel of land owned by the parties "into and over . . . White Lake." Mr. Smith and Mr. Watson obtained the permit in April, 1978, and thereafter "in cooperation with each other, planned and constructed a wooden pier as allowed and authorized by the State." Plaintiffs further alleged

that as a part of said pier a boat stall was constructed; that all of the expenses in connection with this project were shared equally by the plaintiffs and defendants; however, the defendant Jack A. Watson installed at his sole expense a boat wench in the boat stall portion of the pier, but the plaintiff Neil E. Smith has repeatedly offered to pay one-half of the cost of same; that since the construction and completion of this improvement and fixture to the real property above-described, the defendants, Jack A. Watson and wife Phyllis B. Watson, have claimed exclusive rights to the boat stall portion of the pier and have failed and refused to allow the plaintiffs to use and enjoy same together with the defendants.

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Plaintiffs further alleged that a document entitled "Assignment of Pier Rights," executed by defendants and Mr. and Mrs. Starling on 9 December 1977 and recorded on 25 August 1978, did not give defendants "superior and exclusive rights to the boat stall portion of the pier." Plaintiffs asserted that they were unaware of the execution of this document at the time they purchased their property, and alleged that they

were never informed by their Grantors or anyone else, prior to purchasing an interest in said real property, that the defendants might assert rights to a portion of the real property . . . or subsequent improvements thereon to the exclusion of the plaintiffs. . . .

Plaintiffs contended that defendants' refusal to allow plaintiffs use of the boat stall "constitutes a constructive ouster of the plaintiffs . . . for over three and one-half years," damaging them in the amount of \$4,000.00.

Defendants answered, admitting plaintiffs' allegations relating to sale of the land by the Starlings to plaintiffs and defendants and the subsequent recording of the deeds. Defendants denied the remaining material allegations contained in plaintiffs' complaint.

On 22 June 1983 plaintiffs filed a motion for partial summary judgment, asserting that "movant is entitled to a judgment against each defendant as a matter of law on all issues except damages." On 11 July defendants filed a motion for leave to amend their answer to assert the affirmative defense of estoppel; on 28 July defendants filed a second motion for leave to amend their answer to assert a second affirmative defense, that being the statute of limitations. On 23 September 1983 Judge Gore granted plaintiffs' motion for partial summary judgment, ordering that

defendants are hereby permanently restrained and enjoined from denying the plaintiffs the use and enjoyment of the boat stall owned by the parties hereto as tenants in common, that that certain document entitled "Assignment of Pier Rights," dated December 9, 1977 . . . is hereby declared null and void as a matter of law, and that this action shall be tried by a jury on the issue of damages only.

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Judge Gore also denied defendants' motion to amend their answer, holding that the proposed defenses are without basis "in fact or law." Defendants appealed.

Pope, Tilghman & Tart, by Johnson Tilghman, for plaintiffs, appellees.

H. Mac. Tyson II, P.A., by H. Mac. Tyson II, for defendants, appellants.

HEDRICK, Judge.

[1] Ordinarily, an order granting summary judgment on the issue of liability and reserving for trial the issue of damages is not immediately appealable. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). In *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979), however, where partial summary judgment included a mandatory injunction directing the defendant to remove a roadway, this Court said that the order affected a substantial right of the defendant and was thus immediately appealable pursuant to N.C. Gen. Stat. Secs. 1-277 and 7A-27. While we recognize a significant difference between the mandatory injunction entered in *English* and that entered in the present case, we consider the appeal on its merits in the exercise of our discretion.

[2] Defendants' contention that "[t]he trial court committed reversible error by the signing and entry . . . of [the 23 September] order" is bottomed on their assertions that the document dated 9 December 1977 and termed "Assignment of Pier Rights" "gave defendants exclusive rights to the subject matter pier's sole and singular boat stall," and that the terms of this document were binding on plaintiffs, purchasers, as well as on the Starlings, grantors. Resolution of the question of this document's validity is thus essential to a resolution of the issues raised on appeal. The following facts are undisputed:

Michael Starling purchased land abutting the high water mark of White Lake in Bladen County for the purpose of developing the property as a subdivision. Starling divided the property into four lots, on which he constructed houses. Under the plan developed by Starling the owner of Lot 1 and the owner of Lot 3 would each hold a one-half undivided interest in a parcel of beach-

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front land, and the owners of Lots 2 and 4 would also hold a parcel of beachfront land as tenants in common. Because of regulations promulgated by the Department of Natural Resources and Community Development pursuant to N.C. Gen. Stat. Sec. 113-35, the number of piers that could be constructed on the beachfront land was limited to two. Starling determined that the eventual owners of Lots 1 and 3 would share a pier, to be constructed on the beachfront property held by the two as tenants in common. The other pier would be shared by the owners of Lots 2 and 4.

On 9 December 1977 Starling conveyed Lot 1 to defendants by warranty deed, and the deed was recorded that same day. Also on 9 December 1977, in exchange for \$2,000 paid by defendants to the Starlings, Mr. and Mrs. Starling and defendants entered into an "Assignment of Pier Rights," which contained the following pertinent provisions:

WHEREAS, Watson has entered into an agreement to purchase one of the lots described in the hereinabove referred to deed; said lot being designated as Lot One, of four building lots described on said deed, said lot being approximately seventy (70) feet by seventy-two (72) feet; and,

WHEREAS, as a part of and in consideration of the purchase of said lot and dwelling erected thereupon, Watson is to acquire a one-half undivided interest in and to one-half of the beach area fronting on the body of water known as White Lake; and,

WHEREAS, specifically in consideration of and in connection with the purchase of said lot, improvement, and beach area, Watson is to be vested with certain rights to construct and enjoy a pier upon the hereinabove described and referred to beach area to be transferred and conveyed unto Watson.

NOW, THEREFORE, in consideration of the mutual covenants of the parties hereto, the purchase of the hereinabove referred to parcels of real property and dwelling erected thereupon by Watson from Starling, it is agreed as follows:

I. That Starling transfers, assigns and conveys all of his right, title and interest in and to the pier rights assigned to

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the beach area described in the deed executed and delivered this day by Starling to Watson.

II. It is specifically understood and agreed by and between the parties hereto that Watson shall be vested with the right to locate and erect a pier on and from said beach area pursuant to and in accord with any and all applicable regulations or laws of the State of North Carolina or any agency of the State of North Carolina.

III. That the right to use and enjoy the pier and any sundeck facility constructed shall be vested in and to Watson subject to the right of any subsequent purchaser of Lot Number Three of the hereinabove referred to and described lots owned by Starling (as described in deed recorded in Book 224, at page 573, of the Bladen County Registry) to jointly use and enjoy said pier and sundeck area. The cost of locating, erecting and maintaining said pier and sundeck area shall be jointly shared by Watson and the subsequent purchaser and owner of Lot Number Three or as mutually agreed by and between said lot owners.

IV. It is specifically understood and agreed by and between the parties hereto that Watson has bargained for and is hereby assigned and vested with the right to erect, maintain, possess, and enjoy a boatstall upon said pier facility as allowed by the applicable laws and regulations of the State of North Carolina or any agency of the State of North Carolina. In the event that Watson shall elect not to locate, erect, or use a boatstall on said pier facility, said boatstall rights and privileges shall become available to the subsequent purchaser and owner of Lot Number Three as hereinabove referred to and described.

V. This Agreement shall be binding upon the heirs, successors and assigns of the parties hereto.

On 23 February 1978 the Starlings conveyed Lot 3 to plaintiffs by general warranty deed recorded 24 February 1978. The deed made no reference to the document entitled "Assignment of Pier Rights." Sometime after February 1978, plaintiff Neil Smith and defendant Jack Watson obtained a permit to construct a pier on the property held by the parties as tenants in common. In the

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summer of 1978 the parties began to use the newly-constructed pier, and defendants asserted their alleged right to exclusive use of the boatstall. On 25 August 1978 defendants recorded the "Assignment of Pier Rights" dated 9 December 1977.

Citing the well-established rule that an assignee "acquires only such right, title and interest as the assignor had," appellees strongly contend that the Starlings "could not assign to defendants-appellants superior rights to the boatstall because they could not grant or give away something which they did not possess." We do not agree that the Starlings had no interest to convey to defendants; indeed, we believe the interest conveyed may be conceptualized in either of two ways:

First, we note that the effect of the transfer from the Starlings to defendants on 9 December 1977 of a one-half undivided interest in the beachfront property was to create a tenancy in common, shared by defendants and the Starlings. An agreement between tenants in common giving one tenant in common the right to exclusive use or possession of all or part of the property so held "is valid and enforceable, and binding on them, their heirs, personal representatives, and assigns with notice." *Stanley v. Cox*, 253 N.C. 620, 634, 117 S.E. 2d 826, 836 (1961). Appellees recognize this rule, but attempt to escape its application by characterizing Starling as a "third party." The characterization is inaccurate, however, because it ignores the fact that from 9 December 1977, when the Starlings executed the deed to defendants, to 23 February 1978, when the Starlings conveyed their remaining interest to plaintiffs, the Starlings and defendants held the beachfront property as tenants in common.

Although raised by neither party, we believe the agreement entitled "Assignment of Pier Rights" also may be viewed as an attempt to create a covenant running with the land. The law concerning covenants running with the land is set out in some detail in *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978):

A covenant is either real or personal. Covenants that run with the land are real as distinguished from personal covenants that do not run with the land. . . . Three essential requirements must concur to create a real covenant: (1) the intent of the parties as can be determined from the in-

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struments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant.

Id. at 669, 248 S.E. 2d at 907-08. Our examination of the record reveals evidence tending to show that the Starlings attempted to convey to defendants a covenant running with the land, benefiting Lot 1, owned by defendants, and burdening the undivided interest held by the Starlings, and later by plaintiffs, in the beachfront property from which the pier was constructed.

[3] Whether the interest conveyed by the Starlings to defendants be viewed as an agreement concerning exclusive use by tenants in common or as a covenant restricting the use of the boat stall by the owners of Lot 3, we think it clear that the agreement is not binding on plaintiffs as subsequent purchasers for value because of defendants' failure to record the instrument prior to plaintiffs' acquisition of their land. N.C. Gen. Stat. Sec. 47-18.

In *Walker v. Phelps*, 202 N.C. 344, 162 S.E. 727 (1932), our Supreme Court was confronted with facts analogous to those of the instant case. In *Walker*, the grantor Land Bank owned land lying on both sides of a drainage canal. The Land Bank contracted to sell the land on one side of the canal to defendant Phelps; this contract contained certain provisions relating to the maintenance and use of the canal, and was not recorded. Several months later the bank sold the remaining parcel of land to plaintiffs by deed containing similar provisions concerning the canal, which provisions benefited plaintiffs' land. This deed was recorded. Our Supreme Court held that the provisions of the unregistered contract between grantor and defendant were ineffective to bind the rights of plaintiffs. We find *Walker* persuasive authority in the instant case, and hold that the agreement, executed by the Starlings and defendants and not recorded until long after plaintiffs purchased their land, is not binding on plaintiffs as subsequent purchasers for value.

[4] Defendants attempt to escape application of the rule requiring that property interests be recorded in order to be binding on subsequent purchasers by pointing to evidence tending to show that plaintiffs had actual notice of defendants' interest in the boat stall. It is on this contention that defendants base their argu-

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ment concerning equitable estoppel. Our courts have been confronted with similar arguments many times, and have consistently found them to be unpersuasive:

The wisdom embodied in the Connor Act has clearly demonstrated itself in the certainty and security of titles in this State, which the public has enjoyed since the first day of January, 1886, when this act went into effect.

It is necessary in the progress of society, under modern conditions, that there be *one place* where purchasers may look and find the status of titles to land. Therefore, our courts have held many times since this act went into effect that "no notice, however full and formal, will supply the place of registration."

Davis v. Robinson, 189 N.C. 589, 601, 127 S.E. 697, 704 (1925) (citations omitted) (emphasis original). *See also Sexton v. Elizabeth City*, 169 N.C. 385, 86 S.E. 344 (1915).

[5] Defendants finally assign error to the court's refusal to permit amendment of their answer to assert as a defense the statute of limitations. Defendants cite a number of cases in support of their contention that "the applicable three (3) year statute of limitations for personal property expired prior to the filing of Plaintiffs Appellees' Complaint." As the above discussion makes clear, we do not agree that plaintiffs' action is properly characterized as an action to recover personal property. We do not believe the trial court abused its discretion in denying defendants' request for leave to amend.

The judgment appealed from is

Affirmed.

Judges WEBB and HILL concur.

White Oak Properties v. Town of Carrboro

WHITE OAK PROPERTIES, INC., A NORTH CAROLINA CORPORATION v. TOWN OF CARRBORO, A MUNICIPAL CORPORATION; ROBERT W. DRAKEFORD, MAYOR; STEVE ROSE, AN ALDERMAN; JIM WHITE, AN ALDERMAN; JOHN BOONE, AN ALDERMAN; HILLIARD CALDWELL, AN ALDERMAN; ERNIE PATTERSON, AN ALDERMAN; AND JOYCE GARRETT, AN ALDERMAN

No. 8415SC123

(Filed 20 November 1984)

1. Municipal Corporations § 31— denial of conditional use permit—board of aldermen—review by certiorari—applicable statute

G.S. 160A-381, not G.S. 160A-388(e), grants applicants for a conditional use permit the right to petition the superior court for a writ of certiorari to review an adverse decision of a board of aldermen, and since the statute sets forth no time limitation for filing such a petition, it must be filed within a reasonable time.

2. Municipal Corporations § 30— board of aldermen—review of denial of conditional use permit—reasonable time for petition

The time limit of 30 days from notice of decision set forth in G.S. 150A-45 for filing a petition for certiorari under the Administrative Procedures Act and in G.S. 160A-388(e) for filing a petition for certiorari to review a decision by a board of adjustment constitutes a reasonable time within which a petition for certiorari to review a decision of a board of aldermen denying a conditional use permit must be filed.

Judge WEBB dissenting.

APPEAL by respondent Town from *McLelland, Judge*. Judgment entered 20 January 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 25 October 1984.

Petitioners, White Oak Properties, Inc., applied to the Board of Aldermen of the Town of Carrboro for a conditional use permit in order to use a 3.3 acre site for the development of a nineteen unit townhouse project.

In July and August of 1983, the board of aldermen held a series of three public meetings concerning the application. On 2 August 1983, after the final meeting on the matter, the board of aldermen denied petitioner's application stating that the plan was not in harmony with the surrounding neighborhood.

Notice of the decision of the board of aldermen was received by petitioner on 25 August 1983. Petitioner filed a petition for writ of certiorari with the Orange County Superior Court on 11

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October 1983. Respondent filed a motion to dismiss the petition on the ground that under G.S. 160A-388(e) petition for writ of certiorari had to be filed within thirty days of an adverse decision. The Superior Court denied the motion to dismiss and heard the petition on its merits. By judgment entered 20 January 1984, the court reversed the decision of the board of aldermen on the grounds that it was not supported by competent, material and substantial evidence as required by law and remanded the cause to the respondents. From the judgment entered, respondents appealed.

Jordan, Brown, Price and Wall, by Charles Gordon Brown and Jeffrey N. Mason for petitioner appellee.

Michael B. Brough, for respondent appellant.

HILL, Judge.

[1] The threshold question we must address is whether the superior court had jurisdiction to review the decision of the board of aldermen when the petition for writ of certiorari was not filed until forty-seven days after notice of that decision. We must first determine under what statute the superior court has the power to review a decision of the board of aldermen granting or denying a special or conditional use permit. Respondents contend the procedure for appeal from an adverse decision on an application for a special or conditional use permit is set forth in G.S. 160A-388(e) which stipulates that petition for certiorari to the superior court must be filed within thirty days of notice of decision. Petitioner argues that because a board of aldermen and not a board of adjustment, denied the application for the permit, G.S. 160A-381 applies and petition for writ of certiorari may be filed within a reasonable time.

G.S. 160A-381, which grants cities the power to zone, provides that a city may allow a board of adjustment or a city council (board of aldermen) to issue special or conditional use permits. Board of aldermen is a term used interchangeably with city council to name the governing board of a city. G.S. 160A-1(3). "Special use" or "conditional use" are terms used interchangeably to refer to a permit issued for a use which an ordinance expressly permits in a designated zone upon proof that certain facts or conditions detailed in the ordinance exist. *Concrete Co. v. Board of Commis-*

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sioners, 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980).

When a municipality confers the power to grant a conditional use permit to a board of adjustment, G.S. 160A-388 which details the powers and procedures of boards of adjustment applies. That statute provides in part: "Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within thirty days after the decision of the board. . . ." G.S. 160A-388(e). When a board of aldermen retains the power to issue conditional use permits we must turn back to G.S. 160A-381 to ascertain what procedures apply. That statute says in part: "When issuing or denying special or conditional use permits, the [board of aldermen] shall follow the procedures for boards of adjustment *except that no vote greater than a majority vote shall be required . . . , and every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari.*" G.S. 160A-381 (emphasis added).

Statutes should be construed to have their ordinary and natural meaning. We should not presume omissions of words or redundancies. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). The plain reading of G.S. 160A-381 in context is that this statute, not G.S. 160A-388(e), grants applicants the right to petition superior court for writ of certiorari from adverse decisions of boards of aldermen. The statute says that only when issuing or denying a permit must the board of aldermen follow the procedure for boards of adjustment. Appeal is not part of the issuing or denying process. Furthermore, the statute specifically excepts voting and review proceedings from the procedure for boards of adjustment to be followed by boards of aldermen. The significance of the right to apply for certiorari under the one statute as opposed to the other is that although G.S. 160A-388(e) stipulates a thirty day time limit during which petition for certiorari must be filed, G.S. 160A-381 contains no such limitation. However, even in the absence of any statutory time limit, it appears certiorari must be filed within a reasonable time. *Todd v. Mackie*, 160 N.C. 352, 76 S.E. 245 (1912).

[2] Next we must determine what was a reasonable time within which petitioner should have applied for certiorari. Respondent

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argues that in the absence of an express statutory time limit, the period established for similar appeals should be applied by analogy. They admit that no North Carolina case law exists discussing the "analogy rule," but they contend that the sound public policies of certainty and finality in the review of contested cases mandate that we adopt this rule. Petitioner counters that the common law criteria for reasonable time within which to petition for certiorari is laches and that should be the standard of the court. In the present case, they maintain, respondents have suffered no legal or practical prejudice as a result of the delay in filing for certiorari and therefore review on the merits should be allowed.

No North Carolina statutes or case law are determinative of this issue. To arrive at an equitable answer as to what is a reasonable time within which petitioner should have filed petition for certiorari we must look at the history and practice of zoning law in North Carolina and the statutes and ordinances under which the parties were operating.

The Legislature gave cities and towns power to pass zoning ordinances and also the power to appoint a board of adjustment designed to review appeals from administrative decisions of those charged with enforcement of the ordinances. Historically the statutes provided for review by way of writ of certiorari from decisions of boards of adjustment, but supplied no similar process for review of adverse decisions from boards of aldermen. *See* G.S. 160-172, 160-178 (repealed 1971). Courts viewed the decisions of boards of aldermen as legislation not ordinarily subject to judicial review. *In re Markham*, 259 N.C. 566, 131 S.E. 2d 329, *cert. denied*, 375 U.S. 931, 11 L.Ed. 2d 263, 84 S.Ct. 332 (1963). Because both boards of aldermen and boards of adjustment were making similar decisions with regard to zoning applications, confusion reigned. *See* Note, *Spot and Contract Zoning—An Appeal for Clarity*, 51 N.C.L. Rev. 1132 (1973).

In *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974), the Supreme Court brought some order to this area of law when it stated that boards of aldermen act in a quasi-judicial capacity when they decide whether to issue a conditional use permit and that judicial review was available from the decision of the board of aldermen by proceedings in the nature of cer-

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tiorari as provided for in the Administrative Procedures Act (hereinafter APA) G.S. 143-306 *et seq.* (repealed 1973). *See also* G.S. 150A-1 *et seq.* The time for filing a petition for writ of certiorari under the APA is thirty days after notice of final decision is received; *see* G.S. 150A-45, and this limitation was engrafted onto zoning law practice.

The current APA is expressly not applicable to municipalities or their boards. G.S. 150A-2. However, the Supreme Court has stated that the principles that the APA embodies are highly pertinent to municipal zoning decisions. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980). Because the APA is the precursor of current procedure for review of zoning decisions, and because recent case law tends to indicate that we should look to the APA for guidance in this area of the law, we believe it is reasonable to expect a time limit for filing for review which is the same as that provided within the APA.

G.S. 160A-381 and G.S. 160A-388, as amended in 1981, codified what was current practice, that boards of aldermen follow the same procedures as boards of adjustment when they consider applications for conditional use permits. As noted previously, the only exceptions to parallel procedures found within the statute are voting procedures and specified time for applying for certiorari. It is fundamental that legislative intent controls the interpretation of statutes. *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E. 2d 12 (1973). In seeking to ascertain and give effect to the legislative intent, an act must be considered as a whole. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). Statutes which deal with the same subject matter must be construed *in pari materia* and harmonized if possible to give effect to each. *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969); *In re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981).

Applying these principles to the statutes under consideration we conclude that the same procedures should be followed when seeking review of adverse decisions on application for conditional use permits whether delivered by a board of aldermen or a board of adjustment. In the absence of a specified time for applying for certiorari from a board of aldermen which is different from that allowed for appeal from a board of adjustment the reasonable conclusion is that the time limit is the same for both.

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Finally we look to the zoning ordinances of Carrboro for guidance. Where an issue of statutory construction arises the construction adopted by those who execute and administer the law in question is relevant and may be considered. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973).

The Land Use Ordinance of Carrboro treats conditional use permits and special use permits as separate, though it defines each the same. Carrboro Land Use Ordinance § 15-15(14), (63). Special use permits must be obtained from the board of adjustment while conditional use permits are obtained from the board of aldermen. Both boards are required to issue the requested permits unless they find that the application does not meet the criteria set out in Carrboro Land Use Ordinance § 15-54. Carrboro Land Use Ordinance § 15-156, which is a table of permissible uses, sets out which uses are special and which uses are conditional. Under that table in an R 10 zone multifamily residences, like the ones petitioner contemplated building, require a special use permit if five units or less are to be built and a conditional use permit if more than five units are to be built. The Carrboro ordinance provides that every decision of the board of aldermen or the board of adjustment shall be subject to review by the superior court by proceedings in the nature of certiorari. Although a municipality cannot confer or limit jurisdiction upon the superior court, it is apparent that those who execute and administer zoning laws within Carrboro interpret G.S. 160A-381 as requiring that petition for certiorari from an adverse decision of a board of aldermen is, like petition from boards of adjustment, to be filed within thirty days of notice.

We conclude that in the present case thirty days was a reasonable time within which petitioner should have petitioned the superior court for writ of certiorari. Because petitioner failed to file with the superior court within thirty days of notice of the adverse decision of the board of aldermen, we hold the superior court did not have jurisdiction to review the decision of the board and petitioner waived his right of appeal. For this reason the petitioner's appeal should have been dismissed.

The judgment of the superior court is vacated and the case is remanded to the Superior Court, Orange County, with instructions for entry of judgment dismissing petitioner's appeal.

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Vacated and remanded.

Judge HEDRICK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I would hold that the petition for certiorari may be allowed within a reasonable time of the decision of the Board of Aldermen and the petition in this case was so allowed.

I would also hold that we are bound by *Concrete v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, rehearing denied, 300 N.C. 562, 270 S.E. 2d 106 (1980), to affirm the judgment of the Superior Court.

GEORGIA MILLER v. JAMES E. HENDERSON, INDIVIDUALLY AND AS PRINCIPAL OF CHOCOWINITY HIGH SCHOOL; CLIFTON E. TOLER, JR., INDIVIDUALLY AND AS SUPERINTENDENT OF BEAUFORT COUNTY SCHOOLS; WILLIAM E. JEFFERSON, INDIVIDUALLY AND AS CHAIRMAN OF THE BEAUFORT COUNTY BOARD OF EDUCATION; JAMES R. RAPER, HASSELL RESPASS, CHARLES R. SMITH, JR., AND GARY JORDAN, INDIVIDUALLY AND AS MEMBERS OF THE BEAUFORT COUNTY BOARD OF EDUCATION

No. 842SC168

(Filed 20 November 1984)

1. Appeal and Error § 6.2—dismissal of claims against fewer than all of the parties—substantial right affected—appealable

Dismissal of plaintiff's claims against fewer than all of defendants, and the award of attorneys' fees to the dismissed defendants, was substantially equivalent to a partial judgment against plaintiff for a monetary sum, affected a substantial right, and was appealable. G.S. 1A-1, Rule 54(b), G.S. 1-277, G.S. 7A-27(d).

2. Schools § 11—allegations against school principal and board members individually—dismissed

Plaintiff's allegations of defamation, malicious interference with contract rights, and termination of employment without due process against a school principal and board of education members were properly dismissed as to the board members for failure to state a claim upon which relief could be granted where defendant failed to allege any affirmative action or personal involvement on the part of the board members in the defamation, or involvement in

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the termination as individuals rather than as board members. G.S. 1A-1, Rule 12(b)(6), G.S. 115C-40.

3. Attorneys at Law § 7.5— attorneys' fees awarded under 42 U.S.C. 1988—proper

The court did not abuse its discretion in granting attorneys' fees under 42 U.S.C. 1988 to defendants as parties prevailing against meritless claims where the claims against defendants were dismissed for failure to state a claim upon which relief could be granted.

APPEAL by plaintiff from *Lewis, Jr., John B., Judge*. Orders entered 18 September 1983 and 11 October 1983 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 13 November 1984.

This is a civil action wherein plaintiff seeks to recover actual and punitive damages from defendants for defamation and malicious interference with her contractual rights. A motion was filed on behalf of all the defendants to dismiss the complaint for failure to state a claim with respect to each of them for which relief can be granted, or in the alternative, for summary judgment. Plaintiff also filed a motion for summary judgment. By order entered 18 September 1983, the trial court allowed the motion to dismiss as to each of the defendants (hereinafter the "defendant appellees") in their capacities as individuals and public officials, except for the defendant James E. Henderson, and denied plaintiff's motion for summary judgment. Thus, the court dismissed all of plaintiff's claims except for her claim against defendant James Henderson. The court entered a further order on 11 October 1983 ordering plaintiff to pay the defendant appellees' attorneys' fees. From the entry of both orders, plaintiff appealed.

Willis A. Talton for plaintiff appellant.

Tharrington, Smith and Hargrove, by Richard A. Schwartz and Ann L. Majestic, for defendant appellees.

HILL, Judge.

[1] Although not raised by defendant appellees, the first issue we must address is whether plaintiff's appeal is premature. Since the orders appealed from adjudicated the rights and liabilities of fewer than all the parties and did not contain a certification by

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the trial court pursuant to G.S. 1A-1, Rule 54(b), that there was "no just reason for delay," plaintiff's appeal is premature unless the orders affected a substantial right and will work an injury to the appellant if not corrected before an appeal from the final judgment. G.S. 1-277, 7A-27(d); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). In determining what constitutes a substantial right, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978).

We first consider the 18 September 1983 order dismissing plaintiff's claims against the defendant appellees. Plaintiff alleged that defendant James Henderson defamed her and maliciously interfered with her contractual rights, and that Henderson's actions were accepted and approved, or adopted, by the defendant appellees. If plaintiff is not allowed to appeal immediately from the order dismissing her claims against the defendant appellees, she may face a second trial based on the same issues and the possibility of inconsistent verdicts in the two trials. For this reason, we hold the 18 September 1983 order affected the substantial right of plaintiff to have all her claims in this action heard by the same judge and jury, and this will work an injury to the plaintiff if it is not corrected before an appeal from the final judgment. It is therefore immediately appealable. See *Bernick, supra*; *Swindell v. Overton*, 62 N.C. App. 160, 302 S.E. 2d 841 (1983), *modified*, 310 N.C. 707, 314 S.E. 2d 512 (1984).

We further hold the 11 October 1983 order granting defendant appellees' request for attorneys' fees, when considered with the 18 September 1983 order, is immediately appealable. Our courts have held that the entry of a partial summary judgment for a monetary sum against a party affected the substantial right of that party and therefore was immediately appealable. *Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977); *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980). We believe the two orders appealed from in the present case are substantially equivalent to a partial judgment against plaintiff for a monetary sum, and as such, affect a substantial right of the plaintiff.

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[2] We turn now to the merits of plaintiff's appeal. Plaintiff contends the trial court erred in granting defendant appellees' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

Plaintiff's allegations may be summarized as follows in relevant part: Plaintiff had been employed by the defendant appellees at Chocowinity High School since 1977, and was the bookkeeper in the office of the principal at that school in February, 1981, when the defendant Henderson became the principal. Plaintiff remained employed as the school's bookkeeper until 6 April 1982 when defendant Henderson unlawfully and unjustifiably terminated her employment. Henderson informed plaintiff that her employment was terminated because of unsatisfactory work relationships. Plaintiff alleged that while Henderson was principal he misapplied or mishandled school funds on several occasions and tried to force plaintiff to cooperate with him in accounting for the funds. When Henderson determined that he could not force plaintiff to cooperate with him, he fired her.

Plaintiff requested and received a hearing before the Chocowinity Local School Advisory Committee on 6 April 1982 at which time she requested reasons for her termination but was not given any. Plaintiff has never been informed of the decision reached by the advisory committee regarding her termination. Plaintiff then requested and received a hearing before the Beaufort County Board of Education. At the hearing, plaintiff presented her position and requested reasons for her termination, contending that Henderson had no authority to dismiss her. Henderson was present at the hearing and was offered an opportunity to rebut plaintiff's evidence but refused to say anything. The Board of Education stated that it would take the matter under consideration and that plaintiff would be advised of their decision. Thereafter, plaintiff heard nothing further from the Board of Education until 10 March 1983 when plaintiff's attorney called the Board's

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attorney who later advised plaintiff's attorney that the Board had declined to grant plaintiff's request that she be reinstated.

Plaintiff alleged that Henderson's actions constituted a malicious interference with her contractual rights, that his actions were adopted by defendant appellees, and that the termination of her employment by the defendants without affording her due process was a wilful and wanton violation of her constitutional rights. She further alleged that Henderson defamed her and that some of his defamatory statements were accepted and approved by the defendant appellees, as office holders and as individuals.

After carefully examining the complaint, we conclude that even when plaintiff's allegations are taken as true they are not sufficient to state a claim against any of the defendant appellees upon which relief can be granted. To begin with, the complaint is not sufficient to impute liability to the defendant appellees for defamation. Plaintiff's allegations of defamation relate solely to the conduct of Henderson. Plaintiff failed to allege any affirmative action or personal involvement on the part of defendant appellees in the alleged defamatory publication; therefore, they may not be held individually accountable for the actions taken by Henderson alone. See *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979).

Furthermore, plaintiff failed to set forth any allegations which support her remaining claims against defendant appellees for malicious interference with her contractual rights and violation of her due process rights. Plaintiff's claim against Clifton Toler, Jr., individually and as Superintendent of Beaufort County Schools, is fatally flawed because there is no allegation in the complaint that Toler took any part in the termination of plaintiff's employment or that he even had authority to take any action with respect to her employment. Plaintiff's claims against the remaining defendant appellees, as individuals and as members of the Beaufort County Board of Education, fail because the actions and omissions which form the basis for her claims against them were those of the Board of Education as a corporate entity and not those of the individual members of the Board. The Beaufort County Board of Education is a corporate body which has a legal existence separate and apart from its members. See *G.S. 115C-40; Edwards v. Board of Education*, 235 N.C. 345, 70 S.E. 2d 170

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(1952); *McLaughlin v. Beasley*, 250 N.C. 221, 108 S.E. 2d 226 (1959). As such, it has the power and obligation to prosecute and defend suits for and against the corporation and is vested with the authority to control and supervise all matters pertaining to the public schools in the Beaufort County School administrative unit. See G.S. 115C-40. Plaintiff's claims, if brought against anyone other than Henderson, should have been brought against the Beaufort County Board of Education as a corporate entity and not against the individual board members. Since plaintiff did not set forth any allegations of wrongful action taken by the defendant appellees as individual board members or as individuals, she did not state a claim against them upon which relief can be granted. We hold the trial court correctly granted defendant appellees' motion to dismiss.

Plaintiff next assigns as error the court's denial of her motion for summary judgment. Plaintiff did not present any argument or authority in support of this contention in her brief; therefore, it is deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

[3] In her next assignment of error, plaintiff contends the court erred in granting defendant appellees' motion for attorneys' fees pursuant to 42 U.S.C. § 1988. In its order of 11 October 1983, the court found that plaintiff's complaint alleged the defendant appellees acted under color of state law so as to violate plaintiff's constitutional and other rights, and on that basis the court properly concluded the complaint alleged a claim pursuant to 42 U.S.C. § 1983. 42 U.S.C. § 1988 provides that in an action to enforce certain provisions of federal law, including 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fees as part of the costs." The test for determining whether a party is a prevailing party within the meaning of § 1988 is whether the party has been successful on a significant issue in the case. *Lotz Realty Co., Inc. v. United States Department of Housing and Urban Development*, 717 F. 2d 929 (4th Cir. 1983); *Bonnes v. Long*, 599 F. 2d 1316, 1318 (4th Cir. 1979), cert. denied, 455 U.S. 961, 71 L.Ed. 2d 681, 102 S.Ct. 1476 (1982).

It is clear prevailing defendants as well as plaintiffs are entitled to an award of fees under § 1988. See *Christiansburg Gar-*

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ment Co. v. EEOC, 434 U.S. 412, 54 L.Ed. 2d 648, 98 S.Ct. 694 (1978); *Lotz, supra*. In order to be entitled to attorney's fees, however, a defendant must show that the action brought against him was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg, supra* at 422, 54 L.Ed. 2d at 657, 98 S.Ct. at 701. The defendant does not have to show the action was brought in subjective bad faith. *Christiansburg, supra* at 421, 54 L.Ed. 2d at 657, 98 S.Ct. at 701.

The court in the present case concluded that the defendant appellees were the prevailing parties with respect to the claim brought against them, that plaintiff's claim against each of them was meritless, and on that basis granted their request for attorneys' fees. We feel it is clear the defendant appellees were prevailing parties with respect to the claims asserted against them, and agree that plaintiff's claims were meritless or groundless as is demonstrated by the fact they were dismissed pursuant to Rule 12(b)(6). For this reason, we conclude the court did not abuse its discretion in awarding attorneys' fees to the defendant appellees. The orders of the trial court are

Affirmed.

Judges HEDRICK and WEBB concur.

DEPARTMENT OF TRANSPORTATION v. R. J. COMBS; JIMMY D. REEVES,
TRUSTEE; JAMES BADGER; JOHN W. BADGER; TOMMY RAY COMBS;
BILLIE C. HALL AND HUSBAND, GARY HALL

No. 8323SC1298

(Filed 20 November 1984)

Eminent Domain § 7.8; Rules of Civil Procedure § 41.2— highway condemnation action—defendant's filing of voluntary dismissal—abandonment of case—acknowledgment of sufficiency of deposit

Defendant's filing of a "voluntary dismissal without prejudice" in a highway condemnation case when defendant's pleading contained no counterclaim, cross-claim or third-party claim constituted an abandonment of the case by defendant and an acknowledgment that the amount of the Department of Transportation's deposit was adequate compensation for the land taken. G.S. 1A-1, Rule 41(c).

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APPEAL by defendant, R. J. Combs, from *Rousseau, Judge*. Judgment entered 12 July 1983 in Superior Court, ASHE County. Heard in the Court of Appeals 26 September 1984.

Attorney General Rufus L. Edmisten by Senior Deputy Attorney General Eugene A. Smith and Assistant Attorney General Guy A. Hamlin, for the State.

McElwee, McElwee, Cannon & Warden by William H. McElwee, III, and William C. Warden, Jr., for defendant appellant.

BRASWELL, Judge.

We are called upon to determine the effect of a defendant's unusual and novel procedure of taking a "voluntary dismissal without prejudice" to the plaintiff's action in a highway condemnation case when the pleadings of the defendant did not raise any counterclaim, cross-claim or third-party claim. To say "he can't do that!" states a truism of civil procedure. To reach an understanding of the consequences necessitates further examination into the proceedings below.

On 8 June 1981 the North Carolina Department of Transportation filed suit seeking to condemn and appropriate certain property owned by the defendants for the construction of a highway. The plaintiff also filed a Declaration of Taking and Notice of Deposit. On 23 June 1981, the defendants, by and through their attorney Franklin Smith, filed an answer requesting the court to determine just compensation for the taken property. On 27 May 1982, Judge Rousseau entered an order which determined all issues except the issue of just compensation.

The case was regularly calendared for trial on 16 May 1983 before Judge Robert A. Collier, Jr. [The time frame made it 11 days short of one full year after the hearing and order resolving all issues but the amount of compensation.] At 2:00 p.m. the case was duly called for trial. Counsel for the plaintiff was prepared, fully ready with its witnesses, and announced in open court that it was ready to proceed. Although the appellant R. J. Combs and his attorney Franklin Smith were personally present in court, the trial did not go forward. Instead Attorney Smith at 2:05 p.m. filed a written document signed by himself, which reads as follows:

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NOW COME the Defendants and move the Court that they be allowed to take a voluntary dismissal without prejudice in the above-captioned case with the right to reinstate the action, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

The plaintiff objected. The presiding judge stated that any objection would be heard by the Resident Judge, Judge Julius Rousseau.

On 23 May 1983, the plaintiff filed a motion seeking to have the Voluntary Dismissal declared null and void. On 13 June 1983, Franklin Smith filed a motion seeking to withdraw as counsel for Mr. Combs because of "irreconcilable differences." No ruling on the withdrawal motion appears in the record.

The case came on for hearing before Judge Rousseau at the 7 July 1983 non-jury term of Ashe County Superior Court. After the hearing, Judge Rousseau entered a "Final Judgment" in which he concluded that the voluntary dismissal amounted to a dismissal with prejudice. He further construed the filing of the dismissal to mean that the defendants were satisfied with the Department of Transportation's deposit of \$1,675.00 as being adequate compensation for the taken land. The judgment was entered 12 July 1983.

On 20 July 1983, R. J. Combs filed a *pro se* notice of appeal. With its tender of the record on appeal on 22 November 1983, William H. McElwee, III of the law firm of McElwee, McElwee, Cannon & Warden made their first appearance of record for the appellant R. J. Combs in this matter.

The notice of appeal contains only an exception to the entry of judgment. The grouping of the arguments, or questions, raised in the defendant's brief, allege that the final judgment (1) "was in error by finding as a fact that the defendant, R. J. Combs' voluntary dismissal amounted to a dismissal with prejudice and that there was no provision under North Carolina law for the defendant R. J. Combs to reinstate this action and that the defendant R. J. Combs was satisfied with the deposit . . ."; (2) that the judgment "was in error by finding as a fact that the deposit was full and adequate for the interest acquired . . ."; and (3) "was in error by finding as a fact that the sum of \$1,675.00 payable to defend-

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ants was full, fair and adequate compensation” However, on the face of the judgment as printed in the record, we fail to see any “exceptions” listed anywhere. Also, the assignments of error leave blank any listing of the page numbers on which the exceptions may be found, if they had been there. Rule 10(c) of the Rules of Appellate Procedure has not been complied with. An exception to the entry of judgment only brings forward the question of “whether the facts found and conclusions drawn support the judgment.” The question of whether the findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law are not presented. *In re Rumley v. Inman*, 62 N.C. App. 324, 324, 302 S.E. 2d 657, 657 (1983); *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E. 2d 390 (1978). Thus, our standard of review is to determine whether the trial court erred in making its conclusions of law and in entering final judgment thereon.

The rules of law governing dismissals of actions are contained in N.C.G.S. 1A-1, Rule 41 of the Rules of Civil Procedure. Rule 41(a)(1) permits a plaintiff to take a voluntary dismissal without an order of the court:

(i) by filing a notice of dismissal at any time before the plaintiff rests his case, or;

(ii) by filing a stipulation of dismissal signed by all the parties who have appeared in the action.

Our research has failed to disclose any rule, statute, or case which grants a defendant the right to take a voluntary dismissal, whether with or without prejudice, unless the party-defendant taking the dismissal has a pleading which contains a “counter-claim, crossclaim, or third party claim.” See Rule 41(c). Since the rules contain no provision which would permit a defendant to take the action done in this case by Attorney Smith, and since ordinarily such action would be held a nullity, we are constrained to hold that the filing of the voluntary dismissal by Attorney Smith constituted an abandonment of the case by the defendants and also constituted an acknowledgment of satisfaction with the amount of the deposit as being full and just compensation for the quantity of property taken for the project of the “Improvement of Secondary Road 1631, the Old Wilkesboro Road.” The six parcels of land taken along the right of way contain the following portions of acreage: .03, .15, .21, .12, .13, and .01, for a total of .65

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acres. While seven persons are listed as party-defendants, only R. J. Combs has perfected the appeal. Franklin Smith was counsel for all defendants when he acted on 16 May 1983, and he was in court when the events occurred.

To understand the effect of the attempt to take a voluntary dismissal to an action which a party did not institute, we must look at the options a defendant has once he is sued, and strive to analogize the appellant's actions accordingly. In a condemnation action, a defendant has twelve months in which to answer the complaint and declaration of taking. A failure to answer constitutes an admission that the deposit tendered by the State is just compensation. G.S. Sec. 136-107. In his answer or in a motion filed within sixty days after the filing of his answer, a defendant may request that commissioners be appointed to appraise the land. If such a request is made, the Commissioners are appointed as a matter of right. If no request is made, the cause may be set for hearing. G.S. 136-109. Once the case is set for hearing either party may move, pursuant to G.S. 136-110 to have the case continued upon a showing that the effects of the condemnation cannot be determined at that time. Should the defendant choose not to seek a continuance, he then has the option of opposing the Department's property valuation by argument and by offering witnesses. If defendant fails to do so, the State would be entitled to a judgment declaring that the deposit is sufficient to compensate the defendant for his loss.

In the case *sub judice* the defendant filed an answer which prevented the State from receiving a default judgment. No other steps were taken. On the day the case was called for trial Mr. Combs was present with his attorney. The record fails to indicate that he attempted to take any of the steps available to obtain a delay on the matter, nor does it indicate that any request for an extension was made. This leads us to the conclusion that the voluntary dismissal was an acknowledgment by defendant that he was unable to present any evidence to disprove the Department's valuation of the taken property, and, therefore, he would stop contesting the action.

On the other hand, if the defendant was not prepared for trial at the call of the case on 16 May 1983, he had the duty to move for a continuance. No such motion was made. We cannot al-

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low the party who does not go forward and participate in the trial of his case that has been properly calendared and called for trial to work a continuance for his benefit through the use or attempted use of a voluntary dismissal. He does not get another "bite of the cherry."

If the lawsuit had been called for trial and it had been the State which refused to go forward with the lawsuit, the State, as plaintiff, would have been subjected to having the suit dismissed for failure to prosecute. Defendant by his failure to contest the claim, abandoned any claim he may have had for a greater recovery. Had defendant desired to contest his attorney's actions, he was present in the courtroom and could have then objected. Furthermore, if he felt the judgment was improperly entered because of an improper action on the part of his counsel, he could have moved to set it aside under G.S. 1A-1, Rule 60 of the Rules of Civil Procedure. This he failed to do.

We conclude that the conclusions of law support the judgment, and that the trial court's entry of judgment for the plaintiff was correct. The judgment entered is hereby

Affirmed.

Judges WEBB and EAGLES concur.

RICHARD S. HEATHERLY v. MONTGOMERY COMPONENTS, INC. AND THE
TRAVELERS INSURANCE COMPANIES

No. 8410IC19

(Filed 20 November 1984)

**1. Master and Servant § 68.4— workers compensation—subsequent injury—
result of primary injury**

The Industrial Commission's findings and conclusions that plaintiff's second fracture of the leg was the direct and natural result of his previous fracture, which was sustained in the scope and course of his employment, were supported by testimony from plaintiff's doctor that plaintiff's original fracture had not totally healed at the time of the second fracture and would be weaker than normal bone structure.

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2. Master and Servant § 69.1— return to work before full recovery—conclusion of total disability unsupported

Where plaintiff originally suffered a compound leg fracture in the course of his employment, the Industrial Commission's conclusion that plaintiff was temporarily totally disabled from the time his doctor certified that he could return to work under certain restrictions to the time he reinjured his leg was not supported by the Commission's findings, including the finding that plaintiff's leg had not fully healed.

APPEAL by defendants from order of the North Carolina Industrial Commission entered 2 November 1983. Heard in the Court of Appeals 16 October 1984.

Richard S. Heatherly, plaintiff, sustained a compound angulated fracture of the right middle distal tibia on 24 October 1980 while employed by and in the course and scope of his employment with Montgomery Components, Inc., defendant. Plaintiff's physician certified that plaintiff could return to work on 11 June 1981, but plaintiff was to avoid torsional loading because he had a small but persistent area of nonunion of the fracture. Defendant discharged plaintiff when the latter attempted to return to work.

On 4 July 1981, plaintiff's left foot slipped from under him bringing his weight onto his right leg. He sustained a compound refracture of the right middle distal tibia and a fracture of his fibula.

Defendants denied that the fracture of 4 July 1981 was compensable under the Workers' Compensation Act. Deputy Commissioner Winston L. Page conducted a hearing and entered an order denying compensation because plaintiff's injury "did not arise out of and in the course of his employment with defendant, nor was it the direct and natural result of plaintiff's injury by accident on October 24, 1980." Plaintiff appealed to the Full Commission which entered an order, Chairman William Stephenson dissenting, adopting some of Deputy Commissioner Page's findings of fact, finding that the fracture on 4 July 1981 was the direct and natural result of the compensable injury, and entering a compensation award from 24 October 1980. The Full Commission noted that no evidence was presented for which the amount of compensation could be determined for the injury on 4 July 1981. The parties were directed to enter stipulations regarding the extent and

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dates of plaintiff's incapacity to work caused by that reinjury, plus permanent partial disability, if any. Defendants appealed.

Waymon L. Morris for plaintiff.

Roberts, Cogburn, McClure & Williams, by Isaac N. Northup, Jr., for defendants.

WELLS, Judge.

Defendants' assignments of error are that the Full Commission erred in finding as fact and making conclusions of law thereon (1) that plaintiff's fracture on 4 July 1981 was the direct and natural result of the compensable injury of 24 October 1980; (2) that the added pressure on plaintiff's right leg during the fall sustained on 4 July 1981 was sufficient to cause the second injury; (3) that if the first fracture had been healed, the added pressure alone most probably would not have caused the refracture; (4) that plaintiff was temporarily totally disabled as a result of the original injury from 24 October 1980 until 4 July 1981; and (5) ordering defendants to pay all plaintiff's medical bills. We affirm the Full Commission's order awarding plaintiff compensation for the refracture but reverse and remand that part of the order directing defendants to pay compensation from 11 June 1981 to 4 July 1981.

Our courts have consistently held that workers injured in compensable accidents are entitled to be compensated for all disability caused by and resulting from the compensable injury. *Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107 (1975); *accord Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E. 2d 485 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984). In the case before us, the parties agree that plaintiff's accident of 24 October 1980 is fully compensable. The only issue presented by defendants' appeal is whether or not plaintiff's fracture on 4 July 1981 is compensable under the Workers' Compensation Act.

The law in this state is that the aggravation of an injury or a distinct new injury is compensable "[w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent in-

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tervening cause attributable to claimant's own intentional conduct." *Roper v. J. P. Stevens & Co.*, *supra* (quoting *Starr v. Paper Co.*, 8 N.C. App. 604, 175 S.E. 2d 342, *cert. denied*, 277 N.C. 112 (1970)) (cite omitted). Our supreme court defines "intervening cause" in the context of the Workers' Compensation Act as an occurrence "entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result." *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970).

Defendants' assignments of error require that this court determine whether the conclusions of law of the Full Commission were supported by competent findings of fact. In making our review, the Industrial Commission's "findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. . . . Thus, if the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary." *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980) (citations omitted). In cases, such as the one before us, "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Id.* (citations omitted).

Plaintiff proffered expert testimony from his attending physician for the second fracture, Dr. Charles McConnachie, an orthopedic surgeon. His evidence tended to show that plaintiff sustained a compound fracture of his right tibia and fibula. He was aware of plaintiff's previous fracture of the tibia and, in his opinion, it was a refracture along the same fracture line. As to the first fracture, Dr. McConnachie stated that at the time of the refracture it was healing but was not "rock-solid." A notation made on 18 May 1981 by plaintiff's then treating physician stated:

Radiograph shows a persistent small area of nonunion on the medial aspect of the fracture area. The rest of the fracture appears well healed. Will allow return to full activity except he is to avoid torsional loading as much as possible. Repeat x-rays in three months.

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Dr. McConnachie indicated that prior to complete healing the fractured bone would be weaker than surrounding bone, but after complete healing it would be stronger than surrounding bone. On cross-examination he stated that in order to refracture the distal tibia and fracture the fibula would require "trauma, as a slip, or something like that." He noted that the path of the second fracture of the tibia went through the area of the original fracture in part but did not follow the exact angular path of the original fracture throughout and that the fibula was not broken in the original injury. On redirect examination he explained that the reason the fibula was broken in the second injury but not the first was because of the difference in the direction of force applied to the bone structure in the second accident.

[1] We hold that, viewed in the light most favorable to the plaintiff, Dr. McConnachie's testimony provided sufficient evidence to support the Full Commission's findings of fact and conclusions of law that plaintiff's second fracture was the direct and natural result of his original injury. His testimony supported the Full Commission's finding that plaintiff's original fracture had not totally healed at the time of the second fracture and would be weaker than normal bone structure. The Full Commission found that the second fracture would not have occurred unless the original fracture had not healed properly, and this finding of fact is a reasonable inference drawn from Dr. McConnachie's testimony that the second injury was a refracture and that if the plaintiff's original fracture had been fully healed the bone structure would have been stronger than normal bone. A reasonable inference also leading to this finding of fact can be drawn from evidence of plaintiff's original physician that plaintiff was to avoid torsional loading which logically occurred when plaintiff slipped. That the second fracture did not follow the exact same path as the original fracture and also involved the fibula was adequately explained by Dr. McConnachie's testimony that the direction of force was different in each incident.

Our holding is supported by our decision in *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981). In *Mayo*, plaintiff sustained a compensable knee injury on 29 November 1977. Plaintiff reinjured his knee on two subsequent occasions spanning approximately one and one-half months. Plaintiff's physician noted in his treatment records that plaintiff "[w]as injured on

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the job a month ago, was reinjured today." The *Mayo* court held that "[t]his was sufficient medical evidence to establish a causal connection between the [first compensable] . . . accident and the subsequent injuries." *Id.* In the case before us, Dr. McConnachie, who had reviewed the medical records of plaintiff's first injury, repeatedly referred to plaintiff's second compound fracture as a refracture. The medical evidence before the Commission in this case, as previously detailed, was more extensive and more directly related to the issue of causation than in *Mayo*.

[2] The final issue presented by defendants' appeal is whether there was any evidence from which the Full Commission could find that plaintiff was temporarily totally disabled as a result of his original injury by accident from 24 October 1980 to 4 July 1981. Defendants argue that plaintiff's own evidence showed that he was certified to return to work by his treating physician on 11 June 1981.

The Full Commission found as a fact that the original fracture "had not completely healed when the second injury occurred. . . . Plaintiff was temporarily totally disabled as a result of his original injury by accident from October 24, 1980 until July 4, 1981." Defendants excepted to these findings of fact and the conclusions of law based thereon. In making our review, we are limited to a determination of whether there is any evidence to support the Commission's findings of fact and if the findings of fact support the legal conclusions. *Click v. Freight Carriers, supra*.

Our supreme court has held that "there is a presumption that disability ends when the employee returns to work. . . . But this is a presumption of fact and not of law. . . . Receipt of the same wages after injury should create no stronger presumption than the presumption which arises on an employee's returning to work." *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967) (citations omitted). Plaintiff Heatherly was certified to return to work under certain restrictions on 11 June 1981. Plaintiff reported to work but his employment with defendant was terminated. The certification of fitness and plaintiff's attempted return to work is some evidence of the end of temporary total disability. Under these facts, the Full Commission's finding that plaintiff's leg had not fully healed is not dispositive of his capacity

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to earn wages. The findings of the Full Commission that plaintiff was temporarily totally disabled until July 4, 1981 is, in effect, a conclusion of law which is made no less reviewable by virtue of the fact that it is denominated a finding of fact. *Walston v. Burlington Industries*, 49 N.C. App. 301, 271 S.E. 2d 516 (1980), *rev'd on other grounds*, 304 N.C. 670, 285 S.E. 2d 822 (1982).

We hold that the Full Commission's findings of fact do not support the conclusion of law that defendant was temporarily totally disabled from 11 June 1981 to 4 July 1981. As the Full Commission did not make appropriate findings of fact we remand on this issue. *Walston v. Burlington Industries, supra*.

The order of the Industrial Commission as to liability for plaintiff's refracture is

Affirmed.

The order as to temporary total disability from 11 June 1981 to 4 July 1981 is

Reversed and remanded.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. STEVE SWEIGART

No. 844SC119

(Filed 20 November 1984)

1. Criminal Law § 138.7— separate case before sentencing judge—testimony by defendant—dismissed charges

It was not error for the sentencing judge to hear testimony from defendant as a witness in another criminal case relating to charges against defendant which had been dismissed pursuant to a plea arrangement. G.S. 15A-1223(b).

2. Criminal Law § 138— aggravating factor—armed with deadly weapon—sentence exceeding presumptive

The trial court properly found as an aggravating factor that defendant was armed with a deadly weapon at the time of a burglary where the evidence showed that defendant was armed with a butcher knife during commission of the crime, and the trial court properly imposed a sentence in excess of the presumptive term upon the basis of such finding. G.S. 15A-1340.4(a)(1)(i).

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3. Criminal Law § 138— early acknowledgment of wrongdoing— failure to find as mitigating factor

The trial court did not err in failing to find as a mitigating factor that defendant acknowledged wrongdoing to a law officer at an early stage of the criminal process where the State's evidence tended to show that defendant's confession came only after an initial denial of any wrongdoing and a subsequent confrontation by irrefutable evidence.

4. Criminal Law § 138— limited mental capacity— alcohol and drug use— reduced culpability— failure to find as mitigating factor

Although there was evidence that defendant was of limited mental capacity at the time of his commission of a burglary, the trial court did not err in failing to find as a mitigating factor that defendant's limited capacity significantly reduced his culpability for the offense. Furthermore, the trial court did not err in failing to find that defendant's prior alcohol and drug abuse reduced his culpability for the crime. G.S. 15A-1340.4(a)(2)(d) and (e).

5. Criminal Law § 138— exercise of caution to avoid bodily injury— mitigating factor— insufficient evidence

Evidence that, upon hearing voices in the home which he burglarized, defendant ran from the home and dropped or threw down the knife he was carrying did not require the trial court to find as a mitigating factor that defendant exercised caution to avoid serious bodily harm or fear. G.S. 15A-1340.4(a)(2)(j).

APPEAL by defendant from *Bruce, Judge*. Judgment entered 11 November 1983 in Superior Court, SAMPSON County. Heard in the Court of Appeals 28 September 1984.

Defendant was charged in warrants with first degree burglary and breaking, entering and larceny on 20 September 1983. Defendant made a full confession to deputies of the Sampson County Sheriff's Department and there entered into a plea arrangement wherein defendant could plead guilty to second degree burglary and all other charges would be dismissed. The plea arrangement did not deal with sentencing.

On 7 November 1983, defendant entered a plea of guilty to second degree burglary which was accepted by the Honorable R. Michael Bruce, judge presiding, after examination of defendant.

The trial court postponed defendant's sentencing until the conclusion of unrelated jury matters then pending before the court. The trial court also ordered a pre-sentence investigative report on the defendant to be prepared by the Department of Corrections.

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Between the date on which defendant pleaded guilty to second degree burglary, 11 November 1983, and when he was actually sentenced, defendant was subpoenaed to testify in a criminal case heard before Judge Bruce. There defendant was cross examined as to matters relating to charges which had been dismissed pursuant to defendant's plea arrangement. Though the State was aware that defendant had court-appointed counsel, defendant's counsel was not informed that defendant was testifying until after the cross examination was completed.

Because defendant was subjected to cross examination about the dismissed charges in the absence of his court-appointed counsel and in the presence of the sentencing judge, defendant made a written motion to continue the sentencing hearing until the next term of criminal superior court in Sampson County. Defendant's motion was denied. At the sentencing hearing on 11 May 1983 the Honorable R. Michael Bruce, sentencing judge, found that there was one aggravating factor, that the defendant was armed with a deadly weapon at the time he committed the crime. The trial court considered evidence offered by defendant and found that there were no mitigating factors present. Finding that aggravating factors outweighed mitigating factors, the trial court sentenced defendant to 25 years in the custody of the Department of Corrections. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Holland, Poole and Holland, by R. M. Holland, Jr., for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's denial of his motion to substitute the sentencing judge. We find no error.

At the outset, we note that no motion to disqualify pursuant to G.S. 15A-1223 appears in the record. Our examination of the record discloses that defendant filed a written motion to continue on 10 November 1983. The trial court, in its discretion, denied the continuance. In the index to the record on appeal, defendant refers to this motion as a motion to substitute sentencing judge but

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on its face it does not appear to be a motion to substitute or disqualify the judge. Nevertheless, a judge must disqualify himself on his own motion or upon motion of the State or defendant if, for any reason, he is unable to perform the duties required of him in an impartial manner. G.S. 15A-1223(b).

Defendant argues that it is prejudicial error for a sentencing judge to hear testimony from a defendant as a witness in a separate proceeding when defendant is thereafter to be sentenced by the same judge. We note that the sentencing judge would be entitled to hear the complained of information at defendant's sentencing hearing, notwithstanding the fact that the testimony related to charges that had been dismissed pursuant to a plea arrangement. G.S. 15A-1021 et seq. recognizes that the trial court is entitled to be fully informed of the terms of the plea arrangement and the reasons therefor. Defendant has failed to show that he was prejudiced by this assignment of error.

II

[2] Defendant next assigns as error the trial court's finding that aggravating factors outweighed mitigating factors and the imposition of a sentence greater than the presumptive. We find no error.

G.S. 15A-1340.4(b) requires the trial court to specifically list in the record each matter found in aggravation or mitigation if the trial court imposes a sentence of imprisonment that differs from the presumptive term. Further, if the trial court imposes a sentence that exceeds the presumptive term, the trial court must find that the factors in aggravation outweigh the factors in mitigation. The trial court did so. The presumptive term of imprisonment for second degree burglary is 12 years. The defendant was sentenced to 25 years based on the trial court's finding that factors in aggravation outweighed factors in mitigation.

The aggravating factor found by the trial court was that defendant was armed with or used a deadly weapon at the time of the crime. G.S. 15A-1340.4(a)(1)(i). This aggravating factor is supported by competent evidence, i.e., that defendant was armed with a butcher knife during the commission of the crime to which he pleaded guilty.

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III

Defendant argues that he is entitled to be re-sentenced for failure of the trial court to find certain statutorily listed mitigating factors. We disagree.

The Fair Sentencing Act only requires that the trial court *consider* each of the statutorily listed factors in aggravation or mitigation. G.S. 15A-1340.4. Each of the factors in mitigation urged by defendant requires the trial court to exercise its judgment in weighing the evidence presented at the sentencing hearing to reach a factual conclusion. The trial court is not required to list in the judgment statutory factors that it *considers* and rejects as being insufficiently unsupported, i.e., not supported by a preponderance of the evidence. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, cert. denied, 306 N.C. 745, 295 S.E. 2d 482 (1982).

[3] Defendant urges that the trial court should have found the following four factors in mitigation:

(1) At an early stage of the criminal process, defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. G.S. 15A-1340.4(a)(2)(l).

As a basis for this mitigating factor, defendant argues that he made an oral confession which was later reduced to writing. However, State's evidence tends to show that defendant's confession came only after an initial denial of any wrongdoing and subsequent confrontation by irrefutable evidence. This factual situation is distinguishable from *State v. Graham*, 61 N.C. App. 271, 300 S.E. 2d 716, modified and aff'd, 309 N.C. 587, 308 S.E. 2d 311 (1983) cited and relied on by defendant. In *Graham* the evidence was clear and uncontroverted as to the voluntary nature of the confession. Here the State's evidence tends to show that the defendant confessed only after finding that law enforcement officers had strong evidence against him. Defendant's initial denial of wrongdoing does not comport with his argument that he voluntarily acknowledged wrongdoing at an early stage. We find no error in the court's failure to find this mitigating factor.

(2) The defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense. G.S. 15A-1340.4(a)(2)(e), and

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(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense. G.S. 15A-1340.4(a)(2)(d).

[4] The basis for defendant's argument as to these mitigating factors is a report by Dr. Rollins of Dorothea Dix Hospital in Raleigh. Dr. Rollins examined defendant and found that he possessed a reading grade level of 5.2 and a score of 64 on the Slosson Intelligence Test. The diagnosis of defendant was that he had borderline intelligence. Defendant contends that this diagnosis shows that he was of limited mental capacity at the time of the commission of the offense. We agree that there was evidence of limited mental capacity. However, G.S. 15A-1340.4(a)(2)(e) requires the limited mental capacity to exist in such a degree that it "significantly reduced . . . [the defendant's] *culpability* for the offense." [Emphasis added.] This is a factual determination to be made by the trial court. Based on the record before us, we cannot say that the trial court erred in failing to find that the defendant's limited mental capacity "significantly reduced . . . [the defendant's] culpability for the offense."

Evidence tended to show that defendant had a long history of alcohol and drug abuse. Whether this condition of alcohol and drug abuse "significantly reduced . . . [the defendant's] *culpability* for the offense," [emphasis added], was a factual issue for the trial court. Weighing the evidence, the trial court could properly conclude that defendant's physical condition did not significantly reduce defendant's culpability. Whether a defendant's condition as a long term alcohol and drug abuser reduces his culpability must be determined on a case by case basis. Defendant has failed to show that his prior alcohol and drug abuse reduced his culpability in any manner.

(4) The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences. G.S. 15A-1340.4(a)(2)(j).

[5] Defendant urges that the State's own evidence shows that upon hearing voices in the home, defendant turned and ran from the house either dropping or throwing down the knife he was car-

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rying. Defendant urges that these actions show "caution to avoid injury or harm to anyone." We disagree.

Breaking into an occupied dwelling and being armed with a knife is not exercising caution to avoid injury and harm to those occupants who might discover defendant wrongfully in their home. G.S. 15A-1340.4(a)(2)(j) requires the trial court to determine whether defendant could have *not reasonably foreseen* certain consequences of his conduct, and whether defendant *exercised caution* to avoid those consequences. Based on the facts in this case, the trial court could find that defendant could have reasonably foreseen that his conduct in entering the dwelling with a butcher knife would at least threaten serious bodily harm or fear. We hold that the trial court here fully complied with the Fair Sentencing Act.

For the reasons herein stated, we find no error.

Affirmed.

Judges WEBB and BRASWELL concur.

STATE OF NORTH CAROLINA v. MARJORIE HUDSON

No. 842SC57

(Filed 20 November 1984)

1. Criminal Law § 70— tape recordings—admissible

The court did not err by admitting tape recordings of conversations between defendant and an S.B.I. agent where the agent testified that he checked the tape recorder for accuracy prior to taping each conversation by speaking into the microphone and playing it back, that he had used the same machine "hundreds of times," that the machine was capable of recording testimony, that the machine was working properly when the conversations were taped, that he was familiar with the voices of defendant and her husband, that the voices on the tape belonged to defendant and her husband, that the tape had been in the agent's custody from the time it was recorded until the time of trial, and that the agent had made no changes, additions or deletions since the tapes were recorded. Furthermore, the recording device was used to obtain only the most reliable evidence possible of a conversation in which the State's own agent was a participant and which that agent was fully entitled to disclose.

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2. Narcotics § 3.1— prosecution for possession with intent to sell cocaine—device for smoking marijuana—inadmissible

In a prosecution for felonious possession of cocaine with intent to sell and deliver, admission of a device said to be used in smoking marijuana was erroneous; however, the error was made harmless by the court's granting a motion to strike.

3. Criminal Law § 106— motion to dismiss—evidence sufficient

In a prosecution for possession of cocaine with intent to sell and deliver, defendant's motions to dismiss were properly denied where there was evidence from which the jury could find defendant guilty.

4. Narcotics § 2; Indictment and Warrant § 9.7— disjunctive indictment—possession with intent to sell or deliver—incorrect

An indictment which alleged possession with intent to sell or deliver cocaine, in the disjunctive, was incorrect, but defendant waived the defect by not moving to dismiss the indictment.

5. Narcotics § 5; Criminal Law § 124.1— disjunctive verdicts—possession with intent to sell or deliver—improper

The verdict of "possession with intent to sell or deliver" cocaine was inherently ambiguous and did not support the judgment.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 24 August 1983 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 26 September 1983.

Defendant was indicted for two counts of felonious possession of cocaine with intent to sell or deliver and one count of felonious possession of cocaine. The charge of felonious possession of cocaine was dismissed and defendant was convicted of both counts of felonious possession of cocaine with intent to sell or deliver at a jury trial. Defendant was sentenced to two consecutive three year terms of imprisonment. Defendant appeals.

Defendant was indicted, as was her husband, Jimmy Colin Hudson, for possession of cocaine with intent to sell or deliver. Defendant's husband pleaded guilty to three counts of the crime charged and defendant proceeded to trial on two counts.

The evidence tended to show that Eugene Bryant, a Special Agent for the North Carolina State Bureau of Investigation, made several contacts with defendant's husband, Jimmy Hudson. Later, Agent Bryant began making telephone calls to the defendant's residence where defendant resided with her husband.

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On or about 1 September 1982, Agent Bryant purchased cocaine from defendant's husband at defendant's residence.

On or about 30 November 1982, Agent Bryant telephoned defendant's residence and asked for Jimmy Hudson. Defendant responded that Jimmy Hudson could not come to the telephone. Agent Bryant then told defendant he wanted to purchase a gram of cocaine and asked defendant if she could handle it for him. Defendant replied that she could. Agent Bryant then went to the defendant's residence and purchased cocaine from Jimmy Hudson.

On or about 10 December 1982, Agent Bryant again telephoned the defendant's residence and spoke with defendant, asking her if she had any cocaine. Defendant replied that she did. Agent Bryant asked if he could come to her residence at approximately 9:30 p.m. and defendant replied that he could. Agent Bryant then relayed this information to Officer William Boyd of the Beaufort County Board of Alcoholic Beverage Control.

Officer Boyd obtained a search warrant and, accompanied by other law enforcement officers, searched the defendant's residence. A quantity of cocaine was found along with other drug paraphernalia and defendant was arrested.

Defendant's husband testified at her trial. His testimony tended to show that the cocaine was his but his wife knew of its existence. He also testified that defendant did not approve of his selling cocaine and did not use cocaine herself.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

William B. Cherry for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the admission into evidence of tape recordings of conversations between Agent Bryant and the defendant. The basis of defendant's argument is that there was no proper foundation laid for the admission into evidence of the tape recordings in question. We find no error.

To lay a proper foundation for admission into evidence of tape recordings, the State must properly authenticate the evi-

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dence. In *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971) our Supreme Court set forth the factors which must be shown for proper authentication:

(1) That the recorded testimony was legally obtained and otherwise competent;

(2) That the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded;

(3) That the operator was competent and operated the machine properly;

(4) The identity of the recorded voices;

(5) The accuracy and authenticity of the recording;

(6) That defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and

(7) The custody and manner in which the recording has been preserved since it was made.

These standards have been approved in *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979); *State v. Griffin*, 308 N.C. 303, 302 S.E. 2d 447 (1983); and most recently in *State v. Toomer*, 311 N.C. 183, 316 S.E. 2d 66 (1984).

Agent Bryant testified that he checked the tape recorder for accuracy prior to taping each conversation by speaking into the microphone and playing it back to see if the machine was operative. He testified that he had used this same machine "hundreds of times." He further testified that the machine was capable of recording testimony and that the machine was working properly when the calls were taped. Agent Bryant testified that he was familiar with the voices of defendant and her husband and that the voices on the tape belonged to defendant and her husband. He also testified that he had made no changes, additions or deletions since the tapes were recorded and that the tape had been in his custody from the time it was recorded until the time of trial. Further, it appears from the record that the recorded statements were legally obtained and otherwise competent. The recording device was used only to obtain the most reliable evidence possible of a conversation in which the State's own agent was a partici-

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pant and which that agent was fully entitled to disclose. The risk that defendant took by orally offering to provide cocaine for Agent Bryant fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording. See *Lopez v. United States*, 373 U.S. 427 (1963).

We have carefully examined the record here and hold that the State has met all of the authentication requirements of *State v. Lynch*, *supra*. The trial court did not err in admitting the tape recordings in question into evidence.

II

[2] Defendant next assigns as error the admission into evidence of irrelevant, immaterial and prejudicial evidence. The basis of defendant's argument is the admission into evidence of a "power hitter," a device said to be used in smoking marijuana. Defendant argues that the "power hitter" had no reasonable connection to proof of the charge of felonious possession of cocaine with intent to sell or deliver. We agree that it was error to admit the "power hitter" into evidence under the facts of this case. However, the error was made harmless by the trial court's granting a motion to strike as to the "power hitter." Defendant shows no prejudice by this assignment of error.

III

[3] Defendant finally assigns as error the trial court's denial of defendant's motions to dismiss made at the close of the State's evidence, at the close of all evidence, and after the jury's verdict. We find no error.

Our examination of the record indicates there was substantial evidence, considered in the light most favorable to the State, from which a jury could find the defendant guilty of the crimes charged. However, our examination of the record discloses other errors.

[4, 5] Each indictment in this case alleged the offenses of possession with intent to sell or deliver, in the disjunctive. This was incorrect. *State v. McLamb*, No. 8412SC200 (--- N.C. App. --- filed November 6, 1984), citing *State v. Helms*, 247 N.C. 740, 102 S.E. 2d 241 (1958); *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953).

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Since defendant did not move to dismiss the indictment, he has waived this defect for purposes of trial. *State v. Kelly*, 13 N.C. App. 588, 186 S.E. 2d 631, *rev'd on other grounds*, 281 N.C. 618, 189 S.E. 2d 163 (1972). In this case, however, the verdicts submitted to the jury were also in the disjunctive, i.e., guilty of "possession with intent to sell or deliver." The other possible verdicts submitted were guilty of possession and not guilty. The verdict of guilty of "possession with intent to sell or deliver" is inherently ambiguous and does not support the judgment. *State v. Albarty, supra*; *State v. Creason*, 68 N.C. App. 599, 315 S.E. 2d 540 (1984).

In *Creason*, as in this case, the jury returned a verdict of guilty of possession with intent to sell or deliver a controlled substance. We held that:

Since so far as the record shows, some jurors could have found defendant guilty of possessing the . . . [controlled substance] with intent to sell, while others could have found him guilty of possessing it with intent to deliver, and it does not positively appear, as our law requires, that all twelve jurors found him guilty of the same offense, the verdict is uncertain and therefore insufficient to support . . . [the] convictions of either of the crimes charged. [Citations omitted.]

68 N.C. App. at 603, 315 S.E. 2d at 544.

In *Creason*, this court reversed the conviction and remanded to the trial court with instructions to enter judgment for possession of a controlled substance. We find that *Creason* controls here.

At the trial of this case, the State did not introduce evidence as to the amount of cocaine involved in either indictment. At the charge conference, the trial court informed counsel for the State and defendant that the possible verdicts would be guilty of possession with intent to sell or deliver or possession or not guilty. The trial court stated that possession would be misdemeanor possession as to both indictments.

The evidence brought forth at trial supports a finding of guilty as to misdemeanor possession of cocaine in both counts in light of our decision in *Creason, supra*.

In Cases No. 82CRS7579 and 82CRS7400 in which defendant was convicted of possessing cocaine with the intent to sell or

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deliver, we remand for entry of judgment as on a verdict of the lesser included offense of misdemeanor possession of cocaine.

Remanded for entry of judgment and for resentencing.

Judges WEBB and BRASWELL concur.

HELEN C. WRIGHT v. BUS TERMINAL RESTAURANT AND EMPLOYMENT
SECURITY COMMISSION OF NORTH CAROLINA

No. 837SC1270

(Filed 20 November 1984)

**Master and Servant § 108— unemployment compensation—filing claim for benefits
—no voluntary leaving of job**

Where claimant had been told by her supervisor to stay out of work until her attitude could be evaluated by the district manager and that a meeting with the district manager would be scheduled soon, claimant's application for unemployment benefits was not a certification that she was then "unemployed" and did not constitute the voluntary leaving of her job without good cause attributable to her employer so as to disqualify her from receiving such benefits. Rather, plaintiff's job was terminated when the district manager assumed claimant had quit because she had filed the claim and refused to meet with her as scheduled, and this termination of claimant's employment was not attributable to her. G.S. 96-8(10)a; G.S. 96-14(1).

APPEAL by claimant from *Lewis, John B., Jr., Judge*. Judgment entered 18 July 1983 in Superior Court, EDGEcombe County. Heard in the Court of Appeals 25 September 1984.

In this proceeding for unemployment compensation, it was determined first by an Employment Security Commission Adjudicator and then an Appeals Referee that the claimant was not entitled to benefits because she had voluntarily left her last job without good cause attributable to the employer. Upon further appeal this same determination was made by the Employment Security Commission, whose decision was affirmed by the Judge of Superior Court.

The facts, which are not disputed, are to the following effect: Claimant was employed by respondent Bus Terminal Restaurant in 1974 and worked there regularly thereafter until 4 August

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1982. For some time prior to the latter date claimant's immediate supervisor, Ms. Boykins, had been displeased with claimant's attitude and on that day told claimant to take the next week off as vacation and get herself straightened out. Four or five days later claimant asked Ms. Boykins which day she should return to work and was told to stay out without pay until her attitude could be evaluated by the district manager, and that a meeting of the three would be scheduled soon. Twice during the week thereafter claimant again asked Ms. Boykins when she could return to work and was told the district manager would be there on 23 August 1982, but his visit was delayed until 24 August 1982. Meanwhile, on 19 August 1982 claimant asked Ms. Boykins for a layoff slip so she could apply for unemployment benefits, but Ms. Boykins refused to supply one, and the next day claimant applied for unemployment benefits effective 15 August 1982. In completing the application form, which called for information as to why she no longer worked for her most recent employer, claimant stated the foregoing circumstances. Before the scheduled meeting with the district manager he received the notice of the claim and, concluding therefrom that claimant had thereby voluntarily terminated her employment, cancelled the meeting.

In addition to finding the foregoing as facts, the Commission also found that claimant was under suspension for disciplinary reasons when she applied for benefits. And from the facts so found, the Commission concluded as a matter of law that the claimant left her job voluntarily by filing for benefits and was thus disqualified to receive them under express provisions of the Employment Security Law.

Eastern Carolina Legal Services, Inc., by Wesley Abney, for claimant appellant.

No brief filed by respondent appellee Bus Terminal Restaurant.

Thelma M. Hill and V. Henry Gransee, Jr. for respondent appellee Employment Security Commission of North Carolina.

PHILLIPS, Judge.

Since the facts found by the Commission are not contested, the only question presented by this appeal is whether they sup-

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port the conclusion that claimant left her job voluntarily without good cause attributable to the employer. G.S. 96-14(1); *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982). If so, she is disqualified from receiving benefits and the Judge's affirmance of the Commission's decision is correct. But in our opinion the facts found by the Commission do not support the legal conclusion made and this matter is remanded to the Employment Security Commission for further proceedings in accord with the applicable law.

In progressing toward its ultimate decision, the Commission correctly noted that unless claimant was "unemployed," as that word is defined by one of the provisions of G.S. 96-8(10)a, she was not entitled to benefits under our Employment Security Law. From that base, however, instead of analyzing the evidence and determining if it showed that the claimant was unemployed within the purview of the law, and if so when and how she became so, the Commission erroneously deduced that the Employment Security Law requires claimants to be unemployed and concluded therefrom that she was unemployed by virtue of having filed the claim. As a basis for so ruling, the Commission fallaciously declared that any person who files "a new initial claim for unemployment insurance benefits" in this state, as claimant did on 20 August 1982, "is certifying to the Commission that she considers herself unemployed within the meaning of the law." While G.S. 96-8(10)a does require a claimant to be "unemployed" as statutorily defined before *receiving* benefits, neither this statute nor any other in the Employment Security Law requires one to be unemployed before filing a claim or makes filing a claim determinative of the fact of unemployment. Under the law facts such as unemployment and its cause are determined by evidence, rather than statutory implication, and nothing in the evidence or findings of fact indicates that claimant either considered herself to be or was in fact unemployed within the meaning of the law on 20 August 1982. The form supplied by the Commission that she filled out that day instructed her that "The following information is needed to determine your eligibility for unemployment insurance . . . give complete details about why you no longer work for your most recent employer." In response thereto claimant accurately described her suspension and the only certification that she made was that the facts stated were true to the best of her knowledge

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and belief. Having done that and filed the claim with the Commission, determining whether she was "unemployed" as statutorily defined and the claim met the requirements of law was no task of hers. That was the duty of the Employment Security Commission and the Commission had no right to shift it to her. With respect to each claim filed, G.S. 96-15(b)(1) provides in pertinent part, "A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid." Nevertheless, having erroneously burdened claimant with the duty of interpreting the law that applied to her claim and having fallaciously imputed to her a certification that her employment had been terminated, the Commission further concluded that since she had not been fired she must have quit her job voluntarily, and was thus disqualified from receiving benefits under the terms of G.S. 96-14(1).

But the evidence and findings of fact show that when the claim was filed she had not quit her job and continued out of work thereafter, not by any voluntary act of hers, but because of the employer's misinterpretation of her claim and the law that applies to it. At the time the claim was filed all concerned recognized and understood that her employment had not been terminated, and were awaiting a meeting to discuss her suspension, and even after the meeting was cancelled claimant kept trying to arrange another one. The only thing in the record that even suggests that claimant had quit her job is the Commission's finding that the district manager "was of the opinion that by filing such claim claimant intended to terminate her employment." But, of course, what the district manager thought is not evidence of what the claimant intended.

Obviously, then, on 20 August 1982 claimant was not "unemployed" as that word is statutorily defined. Her employment had not been terminated; it was just in abeyance pending a scheduled meeting with the district manager to rule on her suspension. But that she was not "unemployed" on 20 August 1982 does not dispose of her claim and require an affirmance of the judgment appealed from; because the record also shows that she became unemployed four days later when the district manager, misinterpreting her intentions and claim, refused to meet with her as scheduled. Under the circumstances, this refusal to discuss her suspension was, in effect, a termination of her employ-

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ment without cause or an involuntary discharge, and the commission should have so concluded. The termination, and it cannot be considered otherwise, since her suspension necessarily ended when the employer stopped considering her return to work, certainly cannot be attributed to her. She was willing and able to return to work, tried her best to do so, and went to the Employment Security office to have her rights determined only after she had been involuntarily out of work for more than two weeks. An employee has not left her job voluntarily when events beyond the employee's control cause the termination. *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E. 2d 372 (1984).

Nor can claimant's discharge be attributed to misconduct on her part, though the Commission contingently concluded that if the separation had been considered a discharge her misconduct was established by the evidence. This conclusion is likewise without support in the findings of fact and evidence. What the findings of fact and evidence establish is that the sole reason for claimant's termination was the employer's unwarranted assumption that she had quit because she filed a claim. The Commission's gratuitous conclusion that a discharge for cause was either justified or contemplated is contradicted by the employer's sole witness, Ms. Boykins, who testified:

That's what it all boiled down to, and I think if she hadn't come in here and filed for unemployment, and we hadn't got that card on her, that letter from you all on Saturday, I think he would have put her back to work, because we had no intentions of firing her.

* * *

I think more or less he would have put her back to work, if she hadn't of filed for unemployment, so he took it for granted that she had quit.

Though claimant has the burden of showing that she is entitled to benefits under the Employment Security Law, the disqualifying provisions of G.S. 96-14 must be strictly construed, since the main purpose of the law is to benefit eligible workers. It must also be construed, so our Supreme Court has said, to authorize benefits "to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable

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employment and who, though actively seeking such employment, cannot find it through no fault of his own." *In re Watson*, 273 N.C. 629, 633, 161 S.E. 2d 1, 6 (1968). The record indisputably establishes that claimant met each of these conditions except the last one, which the Commission did not address because of its erroneous conclusion that claimant had quit her job by filing a claim. If, upon remand, claimant can show that after the employer terminated her employment she sought other work, as required by G.S. 96-13(a), and was not successful through no fault of her own, she should be awarded the benefits that the law authorizes.

The judgment affirming the decision of the Commission is therefore vacated and this matter is remanded to the Employment Security Commission for further proceedings in accord with applicable provisions of the Employment Security Law and this opinion.

Vacated and remanded.

Judges HEDRICK and BECTON concur.

LINDLEY CHEMICAL, INC. v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 8420SC60

(Filed 20 November 1984)

Insurance § 149— liability insurance—premises-operations coverage distinguished from products liability coverage

In an action to compel defendant insurance company to pay a judgment arising from a third party's use of plaintiff's product, defendant's motion for a Rule 12(b)(6) dismissal was properly granted where plaintiff had purchased "premises-operations" coverage rather than products liability coverage, so that injuries occurring while an activity was in progress were covered, but not injuries occurring away from plaintiff's premises and after physical possession of the products had been relinquished, even if plaintiff had performed a negligent act on its premises.

APPEAL by plaintiff from *Barefoot, Judge*. Judgment entered 5 October 1983 in Superior Court, STANLY County. Heard in the Court of Appeals on 19 October 1984.

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John M. Bahner, Jr., for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray by James P. Crews and David N. Allen for defendant appellee.

BRASWELL, Judge.

Lindley Chemical, Inc., sold a roller cleaner chemical to Tow Dyeing and Finishing Company. While Richard Allen Poplin, an employee of Tow Dyeing and Finishing Company, was using the chemical, it caught fire and Poplin was severely burned. Poplin sued Lindley Chemical, now the plaintiff before us, for the injuries he sustained and obtained a favorable judgment. The defendant-insurance company refused to defend the Poplin lawsuit and refused to pay the judgment, contending the insurance policy specifically excluded coverage. The plaintiff sued the defendant, seeking to force it to pay the Poplin judgment. The trial court, however, granted the defendant's motion to dismiss on the grounds that the plaintiff had failed to state a claim upon which relief could be granted. The plaintiff has appealed this ruling.

To better understand whether the policy does or does not cover the Poplin incident, we recite the following facts. On 1 November 1979, the defendant issued to the plaintiff a policy of insurance denominated as a "casualty insurance policy" which provides "Manufacturers' and Contractors' Liability Insurance Coverage . . . for premises and for the named insured's operations in progress." The policy contains coverage for bodily injury liability and for property damage liability. Coverage A, the bodily injury liability section of the policy, states that "[t]he company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay *damages* because of . . . bodily injury . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the . . . duty to defend any suit against the *insured* seeking damages on account of such *bodily injury*. . . ." However, the policy also expressly provides that "[t]his insurance does not apply: . . . (p) to *bodily injury* . . . included within the *completed operations hazard* or the *products hazard*. In the definition section of the policy, "*products hazard*" includes *bodily injury* and *property damage* arising out of the *named insured's products* or reliance upon a representation or warranty made at any time with respect thereto, but only if the

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bodily injury or property damage occurs away from premises owned by or rented to the *named insured* and after physical possession of such products has been relinquished to others."

Prior to 18 July 1980, the plaintiff sold and delivered an Acetone solvent, "Lintex Cleaner AC," to Tow Dyeing for the purpose of cleaning the rollers on a "Tri-Pad" Machine used in drying dyed cloth. On 18 July 1980, Richard Allen Poplin, a Tow Dyeing employee, climbed on top of the Tri-Pad and poured the solvent onto the rollers. The solvent ignited and the fire burned Poplin severely on his face, arms, and legs. The trial court in Poplin's lawsuit against the plaintiff found and concluded that the plaintiff, "knowing that the product was hazardous and dangerous, had negligently failed to warn [Poplin's] employer . . . or prospective users and specifically [Poplin] as to the dangerous, extremely flammable and other hazardous properties and propensities of the fluid substance" it sold and delivered. The trial court also concluded that the plaintiff had been negligent by "obliterating, painting over and concealing" the adequate warning label appearing on the solvent's drum when received by the plaintiff from its own supplier. The plaintiff was required to compensate Poplin in the amount of \$750,000.00.

The defendant-insurance company, maintaining that the plaintiff's policy did not provide coverage for this incident, twice refused to defend the suit brought by Poplin and refused to pay the \$750,000.00 judgment.

The scope of our review from the order granting the defendant's Rule 12(b)(6) motion is whether "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." (Citations omitted.)" *Brown v. Miller*, 63 N.C. App. 694, 696, 306 S.E. 2d 502, 504 (1983), *disc. rev. denied*, 310 N.C. 476, 312 S.E. 2d 882 (1984). The theory of recovery behind the plaintiff's claim is that their liability to Poplin was based on their "failure to warn" him and Tow Dyeing about the dangers associated with Acetone. The plaintiff contends that since risks created due to their "failure to warn" were not specifically excluded in the policy, then the defendant is liable under the policy. We disagree and hold that because there is no set of facts which the plaintiff could prove that would entitle it to a recovery, the defendant's Rule 12(b)(6) motion was properly granted.

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From the record, it is apparent that the plaintiff purchased what is commonly referred to as "premises-operations" coverage. This type of insurance covers "[a]n injury or a loss [which] may result while an activity is in progress, and prior to the completion thereof, either as a result of an act of negligence or an omission." 7A J. Appleman, Insurance Law and Practice, Sec. 4508 (1979). The applicable section of the policy is entitled "Coverage for Premises and for the Named Insured's Operations in Progress." The plaintiff did not purchase "products liability" coverage which insures against potential injuries caused by products possessing inherent hazards.

At the outset, it is well to recognize that products liability is a coverage that takes over where premises-operations leaves off by means of the various applicable exclusions. Obviously, if the insured carries premises-operations coverage as well as products and completed operations coverage there would be little litigation. Thus the cases that deal with this problem usually involve the situation where the policyholder failed to purchase products and completed operations coverage and a loss occurred that the insurer claims is excluded under the premises-operations portion of the policy.

Id. By its language, the policy excludes coverage for bodily injury arising out of the plaintiff's products if the bodily injury occurred away from the plaintiff's premises and after the physical possession of the products had been relinquished to others. There is no dispute between the parties that Poplin was injured by the product while working on his own employer's premises and while the product was in his employer's possession.

As in the present case, once a product has been completed and distributed in the market, "premises-operations" coverage is not the appropriate coverage and the individual or entity now needs "products liability" coverage. Although the coverages are complementary, they do not overlap and protect against two separate hazards. *Id.* Thus, we find unpersuasive the plaintiff's argument that the "failure to warn" about a product's dangers is a risk contemplated by this policy and not specifically excluded. Such a risk could have properly been insured against had the plaintiff purchased "products liability" insurance instead of or as well as "premises-operations" insurance. Since the insurance it

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did purchase does not extend coverage to off-premises injuries, the plaintiff cannot recover under this "premises-operations" policy.

Likewise, we see no merit in the plaintiff's contention that because it painted over and concealed the existing warning on the drum containing the flammable solvent while it was on its premises and in its possession that the injury falls outside the exclusionary language. The policy speaks with regard to "bodily injuries" which occur while the product is on its premises. It does not contemplate bodily injuries occurring off the premises even though the negligent act may have been committed on the premises.

Also, the major cases cited by the plaintiff in its brief in support of the proposition that the products hazard exclusion does not apply when the negligence surrounding the product consisted of a failure to warn are distinguishable. In each of those cases, the insured had purchased "comprehensive general liability" insurance to protect against the risks associated with the products after they were sold. These insureds, unlike the plaintiff, had not merely purchased insurance to protect against injuries occurring on their premises or injuries associated with the insureds' operations in progress.

Because the plaintiff's claim is specifically excluded by the terms of his insurance policy and because it appears to a certainty that the plaintiff is entitled to no relief under any set of facts, we hold the defendant's Rule 12(b)(6) motion was properly granted.

Affirmed.

Judges WEBB and EAGLES concur.

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PRISCILLA A. LONG v. GEORGE RAY LONG

No. 8418DC98

(Filed 20 November 1984)

1. Divorce and Alimony § 7— no entitlement to alimony—divorce from bed and board action not terminated

The trial court's determination that plaintiff was not a dependent spouse and thus was not entitled to alimony did not terminate plaintiff's action for divorce from bed and board, since a party suing for divorce from bed and board is not required to apply for alimony.

2. Divorce and Alimony § 16.6— dependent spouse—erroneous finding and conclusion

The trial court erred in finding that no evidence of defendant's expenses and income for 1983 was presented where the evidence included defendant's 1982 income tax return and testimony that defendant worked at the same business throughout the marriage and at the time of the hearing and that his standard of living remained the same. The trial court also erred in concluding, partly on the basis of such erroneous finding, that defendant was not a supporting spouse, particularly since the court found that plaintiff had borrowed \$14,000 in order to maintain her accustomed standard of living.

3. Divorce and Alimony § 16— same grounds for alimony and divorce—procedure for determining alimony

Where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce regardless of financial dependency, and the correct procedure in such cases is to allow the jury to render its verdict on the "fault" issues of divorce and then to move to a bench hearing on dependency and the proper amount, if any, of alimony. G.S. 50-16.2; G.S. 50-16.8.

APPEAL by plaintiff from *Cecil, Robert L., Judge*. Judgment entered 21 December 1983, in GUILFORD County District Court. Heard in the Court of Appeals 23 October 1984.

Plaintiff Priscilla Long and defendant George Long married in 1980 and separated in October 1982. Plaintiff filed this action in April 1983, asking for divorce from bed and board, alimony, recovery for damage to her property, and other equitable relief. Plaintiff demanded a jury trial as to all issues. In June 1983 the court, finding that plaintiff was the dependent and defendant the supporting spouse, awarded plaintiff alimony *pendente lite* and enjoined both parties from disposing of marital property. The jury trial commenced 19 September 1983; two days later the court recessed the trial to determine the question of interspousal

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dependency in a bench proceeding. After plaintiff presented her evidence, defendant moved to dismiss. Plaintiff moved to reopen her case, but the court denied her motion and allowed the motion to dismiss, finding that defendant was not a supporting spouse. Based on its finding of no dependency, the court then declared a mistrial. Plaintiff appealed.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff.

Morgan, Post, Herring, Morgan & Green, by James F. Morgan and David K. Rosenblutt, for defendant.

WELLS, Judge.

[1] The court ordered a mistrial after determining that plaintiff was not entitled to alimony. This clearly constituted error.

Suit for divorce from bed and board is not exclusively a means for collection of alimony, but also a means of establishing a certain legal relationship. *See Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E. 2d 790 (1961); 1 Lee, N.C. Family Law § 35 (1979). Although alimony may be the true subject of controversy, the statutory provisions allowing suit for alimony are permissive, not mandatory; a party suing for divorce from bed and board *may*, but is not required to, apply for alimony. N.C. Gen. Stat. § 50-16.8(b) (1976); *McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976). The court's ruling on dependency accordingly could not *ipso facto* terminate the action for divorce. The order of mistrial thus constituted error, and plaintiff is entitled to a new trial.

[2] Plaintiff also assigns error to the court's conclusion of law, based on findings of fact entered after the bench hearing, that defendant was not a supporting spouse. A supporting spouse is a spouse "whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support." G.S. § 50-16.1(4). A spouse meets the definition if he or she qualifies under either test, *see Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971), which essentially is the same as that applied for "dependent spouse." G.S. § 50-16.1(3); *see Galloway v. Galloway*, 40 N.C. App. 366, 253 S.E. 2d 41 (1979). The primary issue is not the supporting spouse's ability to pay, it is whether the spouse seeking alimony is a dependent spouse. The statute looks first to the

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ability of the spouses to maintain the standard of living to which they have become accustomed during the last years of the marriage. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). The burden on the applicant for alimony is to show the accustomed standard of living and lack of means to maintain that standard. *Id.* Only then does the ability of the other spouse to pay become significant. *Id.* (ability to pay discussed only secondarily); see also *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972) (ability to pay separate from determination of dependency). We emphasize that it is not necessary that a spouse be reduced to penury to be considered dependent; the *accustomed* standard of living is the proper measure. *Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E. 2d 867, *disc. rev. denied*, 297 N.C. 299, 254 S.E. 2d 917 (1979).

The court here made several findings regarding the parties' assets and general financial condition, and found that plaintiff had maintained her pre-separation standard of living while borrowing \$14,000. The fact that a spouse can maintain the accustomed standard of living, by whatever means, pending the outcome of alimony litigation, does not determine the dependent-supporting spouse issue. A finding that a spouse was forced to borrow substantial funds in order to maintain her accustomed standard of living would ordinarily lead to the conclusion plaintiff was a dependent spouse.

In reaching its conclusion that defendant was not the supporting spouse the trial court relied on its findings that no evidence as to defendant's gross or net income for 1983 was presented, as well as no evidence as to his personal expenses. When the trial judge sits as finder of fact, the findings are conclusive if supported by any competent evidence. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The mere introduction of evidence does not entitle the proponent to a finding thereon, since the finder must pass on its weight and credibility, see *Vance v. Guy*, 224 N.C. 607, 31 S.E. 2d 766 (1944); however, the trial judge must consider *all* the competent evidence, *Hodges v. Hodges*, 257 N.C. 774, 127 S.E. 2d 567 (1962), and may not ignore relevant issues of fact, *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 65 N.C. App. 242, 310 S.E. 2d 33 (1983), *disc. rev. denied*, 310 N.C. 624, 315 S.E. 2d 689, *cert. denied*, --- U.S. ---, 105 S.Ct. 128 (1984). It follows that when competent evidence on

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an issue is before the court, a finding that *no* evidence has been introduced as to that issue is erroneous. See *Cross v. Baxter*, 604 F. 2d 875 (5th Cir. 1979) (error to ignore substantial evidence).

The evidence introduced included defendant's most recent income tax return 1982, together with testimony that he had worked at the same business, owned by his family, throughout the marriage and still worked there at the time of the hearing, while maintaining the same standard of living. This evidence provided an adequate basis for findings as to defendant's income and take home pay in 1983. The court's finding that no evidence was introduced as to defendant's income and take home pay thus clearly constituted error.

While no evidence was introduced as to defendant's specific expenses, plaintiff did introduce evidence that defendant's standard of living was about the same as before the separation. The burden of showing changes in his expenses lay on defendant, not plaintiff, particularly since that information lay within his control. Moreover, we note that the record contains the order for alimony *pendente lite*, which details all the allegedly missing information, and which the court could have taken judicial notice of. *In re Stokes*, 29 N.C. App. 283, 224 S.E. 2d 300 (1976). We conclude that the findings of no evidence were erroneous, and the conclusions based thereon, apparently based on incorrect interpretation of the law, erroneous. We emphasize, however, that the foregoing erroneous findings go to defendant's ability to pay support, which is a secondary issue, and not to plaintiff's needs for support, which was the primary issue.

[3] Since we have ordered a new trial on the other issues, and since plaintiff's alimony claim was erroneously dismissed, a new trial on all issues is appropriate. Plaintiff's other assignment of error is thus moot. To prevent repetition, we comment briefly on the unusual procedure at the first trial. While it is true that the determination of dependency properly rests with the trial judge, not the jury, *Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E. 2d 243, *disc. rev. denied*, 302 N.C. 634, 280 S.E. 2d 449 (1981); *Bennett v. Bennett*, 24 N.C. App. 680, 211 S.E. 2d 835 (1975); nevertheless, where, as here, the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the right to alimony depends on the legal entitlement to divorce, regardless of finan-

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cial dependency. See G.S. §§ 50-16.2; 50-16.8. The ordinary and correct procedure in such cases, therefore, is to allow the jury to render its verdict on the "fault" issues of divorce, and then, and only then, to move to a bench hearing on dependency and the proper amount, if any, of alimony.

New trial.

Judges ARNOLD and BECTON concur.

JAMES LINVILLE BROWN, PLAINTIFF-EMPLOYEE v. WALNUT COVE VOL-
UNTEER FIRE DEPARTMENT, DEFENDANT-EMPLOYER, AND NATIONWIDE
MUTUAL INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 8410IC74

(Filed 20 November 1984)

Master and Servant § 71.1—volunteer fireman—injured while laid off—compensation based on earnings while employed

Where a volunteer fireman suffered a compensable injury after he had been laid off from Roadway Express for eleven months and had not worked under recall for six months, the Industrial Commission correctly calculated compensation based on plaintiff's earnings at Roadway Express because that vocation corresponded to the primary source of income upon which plaintiff relied and intended to return. The fact that plaintiff had unsuccessfully sought other employment was immaterial, and his small earnings as a self-employed mechanic were not significant because there was evidence that such employment was not where he principally earned his livelihood. G.S. 97-2(5).

Judge WEBB dissenting.

APPEAL by defendants from order of North Carolina Industrial Commission entered 7 November 1983. Heard in the Court of Appeals 23 October 1984.

This appeal involves the proper amount of workers' compensation to be paid a volunteer fireman. The facts underlying the legal controversy of this case are as follows. Plaintiff-employee injured his back while engaged as a volunteer fireman on behalf of the defendant-employer, Walnut Cove Volunteer Fire Department. Nationwide Mutual Insurance Company is carrier for the defendant Walnut Cove Volunteer Fire Department.

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Plaintiff was employed by Roadway Express as a journeyman mechanic in February 1979. He was laid off by Roadway Express on or about 10 May 1980. Between 10 May 1980 and November 1980 his unemployment with Roadway Express continued with the exception of a few weeks. However, his employment was under union contract, and he was subject to recall. At the time of his injury on 3 April 1981, plaintiff had not worked for Roadway Express for six months and had received no wages from Roadway Express during that period. Except for a few weeks between 11 March 1980 and 11 October 1980, he received unemployment compensation for the period between 11 May 1980 and 24 January 1981.

After his lay-off plaintiff attempted unsuccessfully to find new employment, and in mid-March 1981 he became self-employed as a mechanic in a garage behind his house. He presented evidence of twenty-four workslips, twenty-one of which he attributes to the month of March 1981. Only six of the workslips were dated and only thirteen were marked paid. Initially, plaintiff did not include any income from his mechanic shop on his income tax return, but subsequently amended his 1981 return to show \$1,138.00 income therefrom.

The Deputy Commissioner computed plaintiff's compensation rate based on his wages at Roadway Express and awarded plaintiff \$210.00 per week, and further determined he was entitled a twenty percent residual permanent disability compensation at \$210.00 per week. The Deputy Commissioner amended his original order concerning certain dates and the award of attorney fees, and the Full Commission affirmed the amended award. Defendants appeal.

Jerry Rutledge for plaintiff appellee.

Tuggle, Duggins, Meschan and Elrod, P.A., by Richard L. Vanore and J. Reed Johnston, Jr. for defendant appellants.

HILL, Judge.

The sole question presented by this appeal is the correctness of the determination of plaintiff's earnings in setting his compensation. Defendants contend the Industrial Commission erred by holding that plaintiff's compensation benefits were to be based on

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the average weekly wage earned while in the employment of Roadway Express, a company from which plaintiff had been laid off for almost a year. We disagree and for the reasons which follow affirm the decision of the Industrial Commission.

G.S. 97-2(5) of the Workers' Compensation Act provides in pertinent part as follows:

Average Weekly Wages.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52. . . .

In case of disabling injury or death to a volunteer fireman . . . under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman . . . was earning in the employment wherein he principally earned his livelihood as of the date of injury.

The Industrial Commission calculated the compensation rate in this case based on the wages which plaintiff earned during his employment at Roadway Express, concluding that "[t]he General Assembly intended that a volunteer fireman injured under compensable circumstances at a time when he was laid off subject to recall from his principal employment be compensated in accordance with his average weekly wages he was earning when laid off."

Defendants point out that plaintiff was laid off some eleven months prior to the accident and had not worked for Roadway Express for six months prior thereto. Nevertheless, plaintiff's employment with Roadway Express in this case represents "the employment wherein he principally earned his livelihood as of the date of the injury," G.S. 97-2(5), because this vocation corresponds to plaintiff's primary source of income upon which plaintiff relied and intended to return to as soon as he was recalled to work. We do not believe the term "laid off" means a total severance of the employer-employee relationship under the facts of this case. The very fact that plaintiff had been recalled for work at Roadway Express during the interim is evidence that the employer intended to honor its commitment to recall plaintiff during the three

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year period subsequent to the lay off as provided in the union contract. In his claim for injury, plaintiff indicated to the adjuster that he expected to return to work for Roadway Express, and that he did not want his injury to interfere with his regular employment.

The fact that plaintiff sought other outside employment is immaterial. Not only was he unsuccessful, but such a job search was to be expected. His income had been reduced fifty percent after allowance for unemployment benefits. Nor do we consider the small earnings received as a self-employed mechanic to be of any significance. The fact that plaintiff did not report the income originally on his tax return and never took depreciation as a business expense are evidence that such employment was not where he "principally earned his livelihood as of the date of the injury." G.S. 97-2(5).

Furthermore, we believe our holding exemplifies the basic tenet that the intent of the legislature regarding the operation of a particular provision of the Workers' Compensation Act "is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit." *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E. 2d 140, 143, *reh'g denied*, 306 N.C. 753 (1982). This spirit is one of liberal construction, whenever appropriate, "so that benefits will not be denied upon mere technicalities." *Id.* at 277, 293 S.E. 2d at 143. Accordingly, we find no error in the Full Commission's conclusion as a matter of law that "[t]he General Assembly intended that a volunteer fireman under compensable circumstances at a time when he was laid off subject to recall from his principal employment be compensated in accordance with the average weekly wages he was earning when laid off." The Full Commission properly excluded plaintiff's average weekly earnings as a self-employed auto mechanic and properly refused to apply the minimum compensation rate prescribed by statute.

The decision of the Full Commission is

Affirmed.

Judge HEDRICK concurs.

Judge WEBB dissents.

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Judge WEBB dissenting.

I dissent. G.S. 97-2(5) says the plaintiff's compensation is to be based on the weekly wage he was earning "as of the date of the injury." The plaintiff was not earning anything at Roadway Express on the date of the injury. I do not believe his compensation can be calculated on his former wage at Roadway Express.

WARD WESLEY MATHIS v. NORTH CAROLINA DIVISION OF MOTOR VEHICLES AND COMMISSIONER OF MOTOR VEHICLES, R. W. WILKINS, JR.

No. 8428SC602

(Filed 20 November 1984)

**Automobiles and Other Vehicles § 2.4— willful refusal to take breathalyzer test—
sufficiency of evidence**

Plaintiff's license was properly revoked for willful refusal to submit to a breathalyzer test where plaintiff was told of the 30-minute time limit and the consequences of his failure to submit, plaintiff explicitly refused to submit to the test 20 minutes and again 30 minutes after his rights were read to him, and plaintiff expressed a willingness to take the test some 20 minutes after the 30-minute limit had expired. G.S. 20-16.2.

APPEAL by plaintiff from *Allen (C. Walter), Judge*. Judgment entered 22 March 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 23 October 1984.

Ward Wesley Mathis (plaintiff) was arrested and charged with driving under the influence of alcoholic beverages, in violation of G.S. 20-138 (Cum. Supp. 1981). Plaintiff's license was revoked for a period of six months as a result of his "willful refusal" to submit to a breathalyzer test. G.S. 20-16.2 (Cum. Supp. 1981). The revocation order was confirmed after a trial *de novo* in Superior Court pursuant to G.S. 20-16.2(e) (Cum. Supp. 1981) and G.S. 20-25.

On 7 August 1983, at approximately 6:05 p.m., plaintiff was stopped and arrested after being observed driving erratically on U.S. Highway 19-23 by Woodfin Police Officer E. C. Lefler. Plaintiff was thereafter charged with operating a motor vehicle under the influence of alcoholic beverages, in violation of G.S. 20-138 (Cum. Supp. 1981), and was transported to the Buncombe County

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Courthouse in Asheville. In the courthouse "Breathalyzer Room," Officer Lefler, as the arresting officer, "requested Mr. Mathis to take the breathalyzer test." At 6:26 p.m., Officer Lefler and the breathalyzer operator, Officer Stout, had each informed plaintiff of his rights under G.S. 20-16.2(a) (Cum. Supp. 1981), both verbally and in writing. Plaintiff responded that he understood his rights and signed an acknowledgment form to that effect. Officer Lefler again requested plaintiff to take the test "when [Officer Stout] offered it to him." In response to these requests, plaintiff did not take the test but attempted to reach his attorney. Twenty minutes later, plaintiff explicitly refused to submit to the test because "his lawyer told him not to." Ten minutes later, 30 minutes after plaintiff's rights were read to him, plaintiff was again requested to take the test and, despite reminders of the consequences of his actions, refused.

After this final refusal, Officer Stout prepared a refusal affidavit and delivered it to Magistrate Nell Bagwell who processed it. Magistrate Bagwell then commented that she knew plaintiff personally. She walked back to the Breathalyzer Room and, at 7:15 p.m., convinced plaintiff to submit to the test. Officer Stout, however, refused to accede to the magistrate's request.

Following the revocation of his driving privileges for a period of six months, plaintiff petitioned the Superior Court for a trial *de novo* pursuant to G.S. 20-16.2(e) (Cum. Supp. 1981) and G.S. 20-25. The trial court found that plaintiff "without just cause or excuse, voluntarily, understandingly and intentionally refused" to submit to the breathalyzer test and upheld the suspension. Plaintiff appeals.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn and Isaac N. Northrup, Jr., for petitioner appellant.

Attorney General Edmisten, by Deputy Attorney General Jean A. Benoy, for respondent appellee.

VAUGHN, Chief Judge.

Plaintiff principally contends that the evidence does not show that he "willfully refused" to submit to a chemical test and is therefore insufficient to sustain the license suspension order entered against him. G.S. 20-16.2 (Cum. Supp. 1981).

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In support of his position, plaintiff points out that he was willing to take the test at 7:15 p.m., within 30 minutes of his first explicit refusal at 6:46 p.m. Plaintiff contends that there was no evidence that he either heard or acknowledged Officer Lefler's request until that time or knowingly let the 30 minute time limit expire. According to plaintiff, "there is only evidence that he was told of the 30 minute time limit" and there is "no evidence that petitioner voluntarily elected not to take the test." We believe plaintiff's arguments to be patently untenable and clearly contrary to existing case law.

G.S. 20-16.2 (Cum. Supp. 1981) does not require that a suspected drunk driver submit to a chemical test. *Montgomery v. North Carolina Dep't of Motor Vehicles*, 455 F. Supp. 338 (W.D.N.C. 1978), *aff'd*, 599 F. 2d 1048 (4th Cir. 1979). It does, however, provide that a suspect who "willfully refuses" a request to submit to the test will have his driving privileges automatically revoked for a period of six months. The standard of "willful refusal" in this context is clear. Once apprised of one's rights and having received a request to submit, a driver is allowed 30 minutes in which to make a decision. A "willful refusal" occurs whenever a driver "(1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test." *Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E. 2d 133, 136 (1980).

In the present case, plaintiff was requested to take the test and acknowledged an understanding of his rights. Plaintiff was told of the 30 minute time limit and was repeatedly asked if he would take the test before it expired. Plaintiff's initial 20 minute silence in response to those requests does not toll the 30 minute period. Otherwise, any suspect could evade the possible repercussions of testing by simply refusing to cooperate. *Cf. Rice v. Peters, Comr. of Motor Vehicles*, 48 N.C. App. 697, 269 S.E. 2d 740 (1980). Obviously, one may refuse the test by inaction as well as by words. "Refusal," in this context, has been defined as "the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey." *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 233, 182 S.E. 2d 553, 558, *reh. denied*, 279 N.C. 397, 183 S.E.

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2d 241 (1971) (*quoting* Black's Law Dictionary, 4th Ed.). A finding that a driver "did refuse" to take the test is equivalent to a finding that the driver "willfully refused" to take the test. *Id.* at 233, 182 S.E. 2d at 559.

Plaintiff's position is not aided by evidence showing his later willingness to take the test at 7:15 p.m. *See, e.g., Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 259 S.E. 2d 544 (1979); *Etheridge, supra*. Nor is this plaintiff aided by his alleged lack of either understanding or knowledge that the prescribed time limit was expiring. For example, in *Seders, supra*, the petitioner similarly and unsuccessfully argued that due to continuing efforts to contact his attorney, he was unaware that his 30 minute time period had expired. Yet, as in the present case, the Court noted that Seders had been informed of both the existence of the 30 minute deadline and the consequences of his failure to submit. Like Seders, plaintiff, nevertheless, elected to run the risk of awaiting his attorney's call. The actions of each "constituted a conscious choice purposefully made and [their] omission to comply with this requirement of our motor vehicle law amounts to a willful refusal." *Seders* at 461, 259 S.E. 2d at 550. The trial court's conclusion that plaintiff willfully refused to submit is supported by the evidence and will not be disturbed on appeal. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

Plaintiff alternatively contends that he was not properly requested to submit to the test as directed by statute. G.S. 20-16.2(c) (Cum. Supp. 1981) provides that "[t]he arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test. . . ." Plaintiff argues that this language requires a "present request" and was violated in light of testimony in which Officer Stout stated that "[a]fter I informed [plaintiff] of his rights [Officer Lefler] requested him to submit to the test when I offered it to him." We find this argument to be unfounded. The Legislature did not intend to prescribe such precise terminology or to impose "such a rigid sequence of events as contended" by plaintiff. *Rice* at 700, 269 S.E. 2d at 742. Such contrived precision is unnecessary for the protection of suspects and is clearly detrimental to the effective enforcement of drunk driving laws. *See Montgomery v. North Carolina Dep't of Motor Vehicles*, 455 F. Supp. 338 (W.D.N.C. 1978), *aff'd*, 599 F. 2d 1048 (4th Cir. 1979).

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The trial court properly affirmed the order revoking plaintiff's license.

Judgment affirmed.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. BOBBY LYNN STONE

No. 8311SC1312

(Filed 20 November 1984)

1. Criminal Law § 138—resentencing—behavior since original sentencing—properly considered

Where defendant's original sentence on convictions for felonious breaking and entering and felonious larceny was remanded, the record shows that the court considered defendant's post-sentence behavior in that the court stated that it would consider defendant's prison records and school attendance and then found those factors in mitigation. There was no abuse of discretion in giving those factors little or no weight.

2. Criminal Law § 138—resentencing—no credit for gain time—no error

Where defendant's convictions had been affirmed but the sentence remanded, there was no error on resentencing in failing to give defendant credit for "gain time" or "good time" earned between the first and second sentencing hearings.

3. Criminal Law § 138—consolidated sentencing—mitigating and aggravating factors not separately listed

Where defendant was sentenced for two felony offenses, the court erred by failing to list aggravating and mitigating factors separately for each crime.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 14 September 1983 is Superior Court, LEE County. Heard in the Court of Appeals 19 September 1984.

Defendant was convicted of felonious breaking and entering and felonious larceny on 19 July 1982 and was sentenced to a term of ten years, a sentence greater than the presumptive term for the Class H felonies. Defendant appealed his 1982 convictions to this Court. In a nonpublished opinion, this Court found no error

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in defendant's trial but remanded for resentencing. *State v. Stone*, 62 N.C. App. 552. At the resentencing hearing on 12 September 1983, which gives rise to this appeal, the State presented evidence of defendant's prior convictions consisting of misdemeanor larceny, breaking and entering and resisting arrest. Defendant presented his record within the Department of Correction and his report cards from Johnston Technical Institute as evidence of his good prison record and efforts to improve his skills between his conviction on 19 July 1982 and the 12 September 1983 resentencing hearing. Judge Bailey found defendant's prior convictions as factors in aggravation and defendant's good prison record and his school attendance as factors in mitigation. Although Judge Bailey found these factors in mitigation, he declined to give them any weight, stating that "these are matters to be considered by the Board of Parole as they occurred after sentence was imposed [on 19 July 1982, and] [h]e is not entitled to consideration twice." Judge Bailey found that the factors in aggravation outweigh the mitigating factors, consolidated the cases for judgment and imposed a sentence of ten years. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

G. Hugh Moore, Jr., for defendant appellant.

JOHNSON, Judge.

Defendant contends he is entitled to a new sentencing hearing because of errors committed by Judge Bailey.

[1] By his first assignment of error, defendant contends the court erred by failing to consider and give weight to uncontradicted evidence of defendant's post-sentence behavior, which evidence defendant contends supports a nonstatutory finding of factors in mitigation.

First, we note that the court did in fact consider the evidence of defendant's post-sentence behavior. When asked by defense counsel, "Is the court going to consider these documents" [of defendant's prison records and school attendance], Judge Bailey stated, "I'm going to consider them . . ." As further evidence that the court considered these documents, the court in its findings of

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fact stated that the evidence constituted nonstatutory factors in mitigation.¹ Accordingly, the contention that the court failed to consider the evidence of defendant's post-sentencing conduct is without merit.

Second, defendant's contention that the court erred in failing to give any weight to these mitigating factors is also without merit. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982) is dispositive of this contention. In *Davis*, the court stated that

Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, *the weighing of which is a matter within their sound discretion. . . .*

. . . The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. (Emphasis added.)

Id. at 333-34, 295 S.E. 2d at 661.

Judge Bailey's decision in giving little or no weight to the mitigating factors of defendant's post-sentencing behavior finds support in the fact that these are matters to be considered by the Department of Correction in awarding defendant "gain time" and "good time" under its authority granted by G.S. 148-13 and G.S. 15A-1340.7. We find no abuse of discretion and no reason to disturb the balance struck by Judge Bailey that the factors in aggravation outweigh the factors in mitigation. Accordingly, this assignment of error is without merit.

[2] Next, defendant contends that Judge Bailey erred in refusing to give defendant credit for "gain time" or "good time" earned within the Department of Correction between the first and second sentencing hearings. We disagree. Prison rules and regulations respecting rewards and privileges for good conduct are strictly administrative and not judicial. *State v. Shoemaker*, 273 N.C. 475, 160 S.E. 2d 281 (1968).

1. G.S. 15A-1340.4(a) provides that the trial court *may* consider any nonstatutory aggravating and mitigating factors supported by evidence not used to prove an essential element, and which are reasonably related to the purpose of sentencing. See also, *State v. Teague*, 60 N.C. App. 755, 300 S.E. 2d 7 (1983).

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[3] By his final assignment of error defendant contends the court erred in failing to list aggravating and mitigating factors separately for each crime. We agree and remand for resentencing. We find *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) to be controlling on this issue. The trial judge faced a similar issue in *Ahearn* where two offenses were consolidated for hearing and only one set of mitigating and aggravating factors was found to support a sentence greater than the presumptive term. Our Supreme Court held that each offense "must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense." *Id.* at 598, 300 S.E. 2d at 698. Here, the trial court sentenced defendant for two felony offenses and failed to treat them individually in making its findings and erred in so doing. *See also, State v. Farrow*, 66 N.C. App. 147, 310 S.E. 2d 418 (1984).

In conclusion, we hold that the trial judge erred in not making separate findings of mitigating and aggravating factors for each offense. This case must be remanded for resentencing pursuant to *Ahearn, supra*.

Remanded for resentencing.

Judge WHICHARD concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

I do not agree that *Ahearn* requires us to, once more, remand this case for resentencing. I would affirm the judgment.

The majority has found, and correctly so, that there is no error in the Court's findings of aggravating and mitigating factors in either case. The only aggravating factors found are prior convictions for serious crimes and they would be proper aggravating factors in sentencing for any crime. The cases were consolidated for judgment and a single sentence within lawful limit was imposed. In *Ahearn*, separate sentences were imposed for felonious child abuse and voluntary manslaughter. A single set of aggravating and mitigating factors was found. Some of the findings were improper on the child abuse charge (for example, that the of-

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fense was especially heinous, atrocious or cruel) but were appropriate on the voluntary manslaughter charge. The Court found both aggravating and mitigating factors that were inappropriate on either count. In the case before us, however, there is no error in the finding of aggravating or mitigating factors with respect to either of the crimes. We do not, therefore, need the "option of affirming judgment for one offense while remanding for resentencing only the offense in which error is found." *Ahearn* at 598, 300 S.E. 2d at 698.

COASTAL PRODUCTION CREDIT ASSOCIATION v. GOODSON FARMS, INC.,
J. MICHAEL GOODSON AND WIFE, GREYLIN R. GOODSON; SAMUEL
LIEBEN; AMERICAN FOODS, INC.; JEFF D. JOHNSON, III, RECEIVER;
FEDERAL LAND BANK OF COLUMBIA, INC.; AND COMMODITY CREDIT
CORP.

No. 834SC1193

(Filed 20 November 1984)

**Rules of Civil Procedure § 70— default under consent judgment—costs of seizure
of property for public sale—payment of amount owed before sale**

Where a consent judgment directed defendants to pay an indebtedness owed to plaintiffs by a certain date and appointed a commissioner with the authority upon default by defendants to seize and conduct a public sale of the personal property of defendants to settle the indebtedness, the trial court had authority under G.S. 1A-1, Rule 70 to order defendants to pay costs associated with the seizure of their property for public sale after their default notwithstanding defendants paid the entire amount required by the consent judgment after the seizure of their property began and no public sale was ever conducted.

APPEAL by defendants from *Llewellyn, James D.*, Judge.
Order entered 8 August 1983 in Superior Court, SAMPSON County.
Heard in the Court of Appeals 30 August 1984.

Defendant debtors appeal from an order awarding plaintiff costs in the seizing and attachment of defendants' personal property pursuant to a consent judgment. Facts are set out as necessary in the opinion.

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Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for defendants appellants.

Wells, Blossom & Burrows, by Richard F. Burrows, for plaintiff appellee.

JOHNSON, Judge.

Plaintiff, an agricultural credit facility, filed suit in February 1982 on a promissory note executed by the Goodson defendants (hereinafter defendants) and secured by farm real estate and equipment. In December 1982, the parties entered into a consent judgment, by which plaintiff agreed to delay collection proceedings until 16 February 1983. Defendants agreed and were ordered to pay in full at that time. Defendants defaulted again, however, and plaintiff began seizure proceedings in March 1983. On 8 March 1983, defendants tendered partial payment which plaintiff refused. The plaintiff's collection activities were temporarily halted on 9 March 1983 by a court order enjoining the seizing of the property. On 21 March 1983, the temporary restraining order was dissolved and plaintiff began seizure proceedings anew. On 30 March 1983, the trial judge entered an Order staying further collection activities by plaintiff upon the posting of a bond by defendants. Pursuant to the court order, defendants posted bond and plaintiff ceased further collection activities. Plaintiff filed a motion on 24 May 1983 for costs, in the amount of \$9,038.69, incurred in the seizure, inventory and organizing of defendants' personal property for sale. The trial court granted the motion, but reduced the amount of recovery to \$7,375.09. Defendants appeal from this order.

Defendants assert that the trial court was without authority to order payment of costs associated with the seizure of their property for public sale after their default of a loan repayment ordered by a consent judgment. There was statutory authority for the trial judge to order defendants to pay those costs. The authority for the court to award costs can be found in G.S. 1A-1, Rule 70, which is made applicable by the consent judgment entered into by the parties. A consent judgment is a contract between the parties entered upon the record with the approval and sanction of the court. *Bland v. Bland*, 21 N.C. App. 192, 195, 203 S.E. 2d 639, 641 (1974). The consent judgment ordered the defend-

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ants to pay the amount of \$242,379.42, together with interest on the amount of \$222,212.98 at the rate of 12.25% per annum. The order gave the defendants until 4:00 p.m. on 16 February 1983 to pay the indebtedness owed to plaintiffs together with all court costs, attorney fees or other amounts ordered therein.

Where a judgment directs a party to perform a specific act and the party fails to comply within the time specified, various methods by which enforcement of the judgment may be effected are set forth in G.S. 1A-1, Rule 70. The Rule provides in parts pertinent to this dispute the following:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. . . .

G.S. 1A-1, Rule 70.

Defendants failed to perform the act, repaying the loan by 4:00 p.m. on 16 February 1983, as directed by the trial court and consented to by both parties. In the consent judgment, the trial court appointed Richard Burrows as Commissioner and gave him authority upon default by the defendants to seize and conduct a sale of the personal property of the defendants to settle the indebtedness. Defendants, after attempted seizure of the property by the appointed Commissioner, paid the entire amount set out in the consent judgment, therefore a resultant sale was not conducted. The fact a sale was not conducted does not, as defendants would suggest, strip the trial court of its authority to order costs. The procedures as set forth by Rule 70 were substantially complied with and gave the trial court the authority to order defendants to pay the costs of seizing the property.

Defendants argue in the alternative that assuming the trial court had authority to order the payment of costs, the court erred by awarding costs incurred after 8 March 1983. Defendants contend that any costs incurred after 8 March 1983 were unnecessarily incurred due to the fact they tendered the payment of the outstanding principal and interest on that date. We disagree. It is

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well settled in this State that the recovery of costs in a civil action is totally dependent upon statutory authority and without such authority costs may not be awarded. *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972). The trial court had statutory authority to order costs in this action. G.S. 1A-1, Rule 70. Upon being granted that authority, the amount of the costs lies within the discretion of the trial court. The trial court in its order reduced some costs of plaintiff reflecting the court's finding as to the reasonableness of the security charges. The court had authority to order these costs and we do not find that the trial court abused its discretion in ordering the defendants to pay \$1,300.00 to Sanderson Tractor and Equipment Company and \$6,075.09 to Dixieland Agency, Inc. The court made findings of fact and conclusions of law as to the reasonableness of the costs and we will not disturb this award absent abuse of discretion. The order of the trial court is affirmed.

Judges WEBB and PHILLIPS concur.

JULIA MAE DOUGLAS BENNETT v. JAMES WILLIAM BENNETT

No. 8420DC125

(Filed 20 November 1984)

1. Attorneys at Law § 3.2— notice served on defendant's attorney—subsequent notice to Clerk of attorney's withdrawal—adequate notice to defendant

Where notice that plaintiff would move to have defendant held in contempt for failure to pay child support was served on defendant's attorney of record but not on defendant, and the attorney subsequently sent the Clerk of Court a letter which stated that he did not represent defendant, the notice was sufficient because there was nothing in the record to show the attorney had been relieved before the notice was served on defendant.

2. Contempt of Court § 5.1— show cause order—sufficiency of notice

Where defendant was found in contempt at a hearing on 19 July 1983 following a notice that plaintiff would move to have defendant held in contempt, the statutory requirement of a show cause order was satisfied by an order issued on 25 January 1982 which had never been acted upon. G.S. 5A-15, G.S. 5A-23(a).

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3. Contempt of Court § 6.3— civil contempt—findings sufficient

Where a court did not state whether it was finding defendant in civil or criminal contempt, but punished him as if he was in civil contempt, a finding that defendant was an "able-bodied man, and capable of working, gainfully employed, earning money and capable of making said payments," was sufficient to support an order of contempt.

4. Contempt of Court § 7— civil contempt—punishment—180 days not improper

Where the court found defendant in civil contempt, there was no error in sentencing him to imprisonment for 180 days or until he complied with the court's order. Defendant could have been imprisoned under G.S. 5A-21(b) until he purged himself of contempt.

5. Contempt of Court § 7— incarceration for failure to pay child support—release conditioned on making payments not yet due—improper

Where defendant was held in contempt and incarcerated for failing to make child support payments, the court erred by requiring defendant to make child support payments which were not yet due in order to obtain his release.

APPEAL by defendant from *Honeycutt, Judge*. Order entered 19 July 1983 in District Court, ANSON County. Heard in the Court of Appeals 25 October 1984.

The defendant appeals from an order holding him in contempt of court. The plaintiff and the defendant were married and have four minor children. On 21 August 1981 a judgment was entered which granted the plaintiff a divorce and required the defendant to pay child support. The defendant consented to this judgment.

On 25 January 1982 the Court ordered the defendant to appear and show cause on 15 February 1982 why he should not be held in contempt for wilfully violating the judgment. The show cause order was served on the defendant's attorney but was not served on the defendant. On 16 February 1982 the Court ordered the defendant arrested to be held pending a hearing on the show cause order with a release order requiring a \$200 bond. The record shows that this order was served on the defendant on 10 March 1982. On 1 September 1982 the plaintiff gave notice to the defendant that she would move on 28 September 1982 to have him cited for contempt. This notice was served on the defendant personally. There is nothing in the record to indicate what action was taken on this motion. On 1 December 1982 the plaintiff filed a notice that she would bring the matter on for a hearing on 13 December 1982. This notice was not served on the defendant but

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it was served on the defendant's attorney. On 14 December 1982 the Court entered an order in which it found that defendant had failed to appear at the hearing. It ordered arrest of the defendant to be held until the hearing on the show cause order could be held. It allowed the release of the defendant upon the posting of a bond for \$1,000. The record does not show that this order was executed. On 27 June 1983 the plaintiff again filed a notice that she would move to have the defendant held in contempt on 19 July 1983. A copy of this notice was served on the defendant's attorney but was not served on the defendant. The defendant's attorney of record sent a letter dated 28 June 1983 to the Clerk of Superior Court in which he stated he did not represent the defendant.

An order was filed on 19 July 1983 in which the Court found among other facts that the defendant was in arrears in the amount of \$3,705.00 in child support, and had refused to pay \$200 to the plaintiff's attorney as he had been ordered to do. It found further that the "defendant is a healthy, ablebodied man, able and capable of working, gainfully employed, earning money and capable of making said payments." The Court found the defendant was in wilful contempt of court and ordered that he be incarcerated in the Anson County jail for 180 days or until he paid the arrearage plus any child support payments accruing after 15 July 1983, plus \$500 in attorney fees for the plaintiff's attorney, which fee the Court allowed.

The defendant appealed.

E. A. Hightower for plaintiff appellee.

Henry T. Drake for defendant appellant.

WEBB, Judge.

[1] The defendant first argues that he was not given proper notice of the hearing. The notice for the 19 July 1983 hearing was served on the defendant's attorney but not on the defendant. *Hinnant v. Hinnant*, 258 N.C. 509, 128 S.E. 2d 900 (1963), holds that this is sufficient notice. There is nothing in the record to show the attorney was relieved after the child support order was entered and before the notice was served on him. We hold the notice was sufficient. The defendant was not, as he contends,

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deprived of his rights under the United States or North Carolina Constitution.

[2] The defendant next argues that he was not properly in court because a show cause order had not been issued by the Court for the hearing on 19 July 1983. G.S. 50-13.4(f)(9) provides that an order for child support payments is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt. In either case the proceedings are commenced by a show cause order issued by the Court. See G.S. 5A-15 and G.S. 5A-23(a). The defendant contends that whether this be a proceeding for civil or criminal contempt there was no order to show cause issued by a court for the 19 July 1983 hearing and he was not properly before the Court. A show cause order had been issued on 25 January 1982 ordering the defendant to appear on 15 February 1982. No action had been taken on this order. We hold that this outstanding show cause order upon which no action had been taken satisfied the statutory requirement that a hearing be held on a show cause order. The plaintiff gave the defendant notice on 27 June 1983 that she would bring the show cause order on for hearing on 19 July 1983. The defendant should not have been in doubt as to what was to be heard.

[3] The defendant next argues that the Court did not find sufficient facts to support an order of contempt. The Court did not say whether it found the defendant in civil or criminal contempt. It punished the defendant as if he was in civil contempt. In order to hold a defendant in civil contempt the Court must find that the defendant presently possesses the means to comply with the order. See *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971). In this case the Court found the defendant is an "ablebodied man, and capable of working, gainfully employed, earning money and capable of making said payments." We hold this constitutes a determination that the defendant has the means to comply with the order of the Court. *Reece v. Reece*, 58 N.C. App. 404, 293 S.E. 2d 662 (1982).

[4] The defendant argues finally that the Court ordered his imprisonment for an excessive period. The Court found that the defendant was in civil contempt. It was not limited by G.S. 5A-12 to imposing a thirty-day sentence for criminal contempt. It could, under G.S. 5A-21(b), have ordered his imprisonment until he

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purged himself of contempt. It limited the sentence to 180 days or until he complied with the Court's order. In this we find no error.

[5] We hold that the Court could not order the incarceration of defendant for payments which were not yet due. This the Court did by requiring the defendant to make child support payments which accrued after 15 July 1983 in order to obtain his release. We hold that this portion of the Court's order must be deleted. With this exception we affirm the order of the District Court.

Modified and affirmed.

Judges HEDRICK and HILL concur.

DAVID SUGGS, EMPLOYEE, PLAINTIFF v. KELLY SPRINGFIELD TIRE COMPANY, EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, DEFENDANTS, CARRIER

No. 8410IC214

(Filed 20 November 1984)

1. Master and Servant § 99— workers' compensation—insurer's withdrawal of appeal—award of attorney's fee

The Industrial Commission had authority under G.S. 97-88 to award an attorney's fee to plaintiff in a workers' compensation case upon the withdrawal of an appeal by the employer and its insurer from an opinion and award in favor of plaintiff where the order removing the case from the review docket expressly directed the insurer to "forthwith comply with the Opinion and Award."

2. Master and Servant § 99— workers' compensation—withdrawal of appeal—interest on award

The Industrial Commission had authority under G.S. 97-86.2 to grant plaintiff interest on a workers' compensation award for the period between entry and actual payment when defendants, the employer and its insurer, withdrew their appeal from the award, since the abandonment of defendants' appeal after it had been calendared for review was the equivalent of affirmance of the award within the meaning of G.S. 97-86.2.

APPEAL by defendants from order of the North Carolina Industrial Commission filed 23 June 1983. Heard in the Court of Appeals 14 November 1984.

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Defendants appeal from an order awarding interest and attorney's fee to plaintiff upon defendants' withdrawal of their appeal from an opinion and award in favor of plaintiff.

Russ, Worth, Cheatwood & McFadyen, by Walker Y. Worth, Jr., for plaintiff appellee.

Gene Collinson Smith for defendant appellants.

WHICHARD, Judge.

On 16 July 1982 the Chief Deputy Commissioner of the Industrial Commission entered an opinion and award granting additional temporary total disability compensation to plaintiff. Defendants, through counsel, sought review by the Full Commission. Defendants' counsel certified his belief that there were "good grounds for appeal"; he subsequently filed a formal Application for Review specifying the grounds for appeal and abandoning all other grounds.

By letter dated 3 March 1983, however, counsel for defendants advised the Commission that after further review defendants wished to withdraw the appeal and pay the award. On 9 March 1983 the Commission removed the case from the review docket. Its order provided: "Defendants shall forthwith comply with the Opinion and Award . . . filed July 16, 1982."

On 23 June 1983, pursuant to plaintiff's motion, the Commission entered a further order granting plaintiff interest on the award for the period between entry and actual payment. The order also awarded plaintiff an attorney's fee for defendant's having "appeal[ed] this case . . . without reasonable ground." Chairman Stephenson dissented, believing the Commission lacked statutory authority to enter these awards. We affirm.

ATTORNEY'S FEE

[1] G.S. 97-88 provides:

If the [I]ndustrial Commission at a hearing on review . . . shall find that such hearing or proceedings were brought by the insurer and the Commission . . . orders the insurer to make, or to continue payments of benefits . . . to the injured employee, the Commission . . . may further order that the

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cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

This Court has stated: "The better interpretation of this statute is that the Commission, in its discretion, can award attorney fees only when an appeal is before it to review a hearing commissioner's decision." *Buck v. Proctor & Gamble*, 58 N.C. App. 804, 806, 295 S.E. 2d 243, 245 (1982).

This case was before the Commission "on review" upon an appeal by both defendants; the Application for Review expressly indicated that it was filed on behalf of both the employer and the insurer. The "brought by the insurer" requirement thus is met. The order removing the case from the review docket expressly directed that defendants "forthwith comply with the Opinion and Award." The Commission thus, on review, "order[ed] the insurer to make . . . payments of benefits . . . to the injured employee."

Defendants' ultimate withdrawal of their appeal altered neither the fact that the Commission had had before it, on review, an appeal brought by the insurer, in which it ordered the insurer to pay benefits to the injured employee, nor the fact that the injured employee incurred expenses for counsel in the appeal process to that point. We believe the express requirements of G.S. 97-88, as well as its purpose or intent, have been met. We thus hold that the Commission had authority to award an attorney's fee and did not abuse its discretion in doing so.

INTEREST

[2] G.S. 97-86.2 provides:

When, in a worker's compensation case, a hearing or hearings have been held and an award made pursuant thereto, if there is an appeal from that award by the employer or carrier which results in the affirmance of that award or any part thereof which remains unpaid pending appeal, the insurance carrier or employer shall pay interest on the final award from the date the initial award was filed . . . until paid at the legal rate of interest

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The Commission found that abandonment of defendants' appeal, after it had been calendared for review, was "the equivalent of . . . affirmance of [the] award within the meaning of G.S. 97-86.2." We find this construction in accord with the meaning and purpose of the statute. We again note that the order directed defendants to "forthwith comply with the Opinion and Award." This directive has the import of an affirmance. Further, a contrary holding would, as noted by the Commission majority, permit circumvention of the compensation statutes by appeals taken but subsequently abandoned upon calendaring for review; carriers, through frivolous appeals, could temporarily deprive injured employees of awards while retaining the earnings thereon. We do not believe the General Assembly, in the enactment of G.S. 97-86.2, intended to permit this result.

We thus hold that the Commission had authority to make the award and did not abuse its discretion in doing so. We agree with Chairman Stephenson, however, that clarification of the statute expressly to permit this result is desirable.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

LDDC, INC., A FLORIDA CORPORATION v. ALASKA HOLLAND PRESSLEY AND
HUBERT W. PRESSLEY

No. 8430SC61

(Filed 20 November 1984)

1. Tenants in Common § 5— easement over common property—conveyance by one cotenant

The court properly granted summary judgment for one respondent in a declaratory judgment action arising from the conveyance by the other respondent to petitioner of a one-half undivided interest in one of two contiguous tracts owned by respondents as tenants in common, with an easement for a sixty-foot right of way over the adjoining tract. One tenant in common may not bind a cotenant by any act relating to the common property in the absence of ratification or estoppel.

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2. Declaratory Judgment Act § 4— declaratory judgment action appropriate to interpret written instruments—no bar to summary judgment

An action for a declaratory judgment is appropriate to interpret written instruments, and there is no bar to granting a summary judgment in a declaratory judgment action. G.S. 1-253.

APPEAL by petitioner from *Downs, Judge*. Judgment entered 13 September 1983 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 25 October 1984.

This appeal arises from a summary judgment entered in a declaratory judgment action. Respondent Hubert W. Pressley and his wife, respondent appellee Alaska Holland Pressley, owned two contiguous tracts of land as tenants in common. Mr. Pressley conveyed by deed a one-half undivided interest in one of the tracts to petitioner LDDC. Alaska Pressley did not join in that conveyance. According to the deed, this conveyance included an easement for a sixty foot right-of-way over the adjoining tract.

Petitioner subsequently instituted a special proceeding to have the conveyed tract partitioned between the new co-tenants, petitioner and respondent Alaska Pressley. In her answer to the petition, Ms. Pressley apparently denied the easement in some manner. The petition for partition and Alaska Pressley's answer thereto do not appear in the record; however, in petitioner's "Petition for Declaratory Judgment," petitioner states that in her answer, Ms. Pressley "denies that petitioner has an easement as set forth in the deed from Hubert W. Pressley to the Petitioner."

Petitioner then brought an action for a declaratory judgment against both Hubert and Alaska Pressley to determine the validity of the easement, asking the court to declare the easement as set forth in the deed valid and binding upon the respondents. Mr. Pressley did not file a response. Ms. Pressley filed an "Answer and Motion for Summary Judgment," in which she alleged that as tenant in common, Hubert Pressley cannot convey a valid easement as to the interest of his co-tenant, Alaska Pressley, in the lands retained by them as tenants in common, and requested that the trial court declare "Petitioner has no easement as to any interest of said Respondent in and to lands owned by said Respondent as tenant in common with Hubert W. Presley. [sic]."

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The trial court granted summary judgment, concluding that petitioner did not acquire an easement in the undivided one-half interest of respondent appellee in the adjoining tract, and reasoning that no issues of material fact remained, dismissed the action. Petitioner appeals.

Edward Thornhill, III, P.A., for petitioner appellant.

Brown, Ward, Hayes & Griffin, P.A., and Long, Parker, Payne & Matney, P.A., by Steve Warren, for respondent appellee Alaska H. Pressley.

VAUGHN, Chief Judge.

[1] We hold that the trial court was correct in concluding that Hubert Pressley, as tenant in common with Alaska Pressley, could not convey an easement for a right-of-way to petitioner which would bind Alaska Pressley, where she did not join in the conveyance. We therefore affirm.

A tenancy in common is characterized by a single essential unity, that of possession, or the right to possession of the common property. *Lockleair v. Martin*, 245 N.C. 378, 381, 96 S.E. 2d 24, 26 (1957). Each tenant owns a separate undivided interest in the land in his or her own right, and each has an equal right to possession. J. Webster, *Real Estate Law in North Carolina* § 110 (Rev. ed. 1981).

Ordinarily, one tenant in common may not bind a co-tenant by any act relating to the common property in the absence of ratification or estoppel. *Hinson v. Shugart*, 224 N.C. 207, 29 S.E. 2d 694 (1944). This concept has been applied in analogous circumstances to those before us. In *Investment Co. v. Telegraph Co.*, 156 N.C. 259, 72 S.E. 361 (1911), a corporate defendant granted a third party the right to post two telephone wires to poles owned by defendant with another corporation as tenants in common. The Supreme Court held that "whether the right which defendant undertook to grant plaintiff be considered a lease . . . , an easement, or revocable license . . . ,"*id.* at 265, 72 S.E. at 363, defendant had granted that which it was without power to grant:

"The general rule seems to be well settled that one tenant in common cannot, as against his cotenant, convey any part of

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the common property by metes and bounds, or even an undivided portion of such part. . . . The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner as to compel his cotenants to take their shares in several distinct parcels. . . . Even though his deed may bind him by way of estoppel, as against the cotenants, such deed is inoperative and void. . . . Though tenants in common are . . . all seized of each and every part of the estate, still they are not permitted to do acts which are prejudicial to their cotenants. . . . As one tenant in common cannot convey the entire estate, or the whole of any portion thereof, . . . he cannot subject the common property to particular servitudes, by which the rights of his cotenants will be affected. . . ."

Id. at 264, 72 S.E. at 363 (citations omitted). See also *Browning v. Highway Commission*, 263 N.C. 130, 134, 139 S.E. 2d 227, 229 (1964) (the purchase of an easement from one co-tenant does not carry with it an easement in the interest of the other co-tenant). North Carolina law appears to conform to the majority rule. 86 C.J.S. *Tenancy in Common* § 111 (1954).

[2] The quoted passage governs the matter before us and confirms the propriety of the trial court's order. This action was properly brought as one for a declaratory judgment, see G.S. 1-253; *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964), which actions are appropriate to interpret written instruments. *Bellefonte Underwriters Insur. Co. v. Alfa Aviation*, 61 N.C. App. 544, 300 S.E. 2d 877 (1983), *aff'd*, 310 N.C. 471, 312 S.E. 2d 426 (1984). See also *Shingleton v. State*, 260 N.C. 451, 133 S.E. 2d 183 (1963) (declaratory judgment to determine extent of easement granted by State proper). Having ruled that petitioner did not acquire an easement in the undivided one-half interest of respondent appellee, there was nothing left to decide, and the trial court properly dismissed the action. We note there is no bar to granting a summary judgment in a declaratory judgment action, *Threatte v. Threatte*, 59 N.C. App. 292, 294, 296 S.E. 2d 521, 523 (1982), *aff'd*, 308 N.C. 384, 302 S.E. 2d 226 (1983), such motions being governed by the same rules applicable to other actions. *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E. 2d 35, 42 (1972).

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Affirmed.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. RUDY VALLEY DORSEY

No. 8426SC44

(Filed 20 November 1984)

1. Constitutional Law § 48— effective assistance of counsel—failure to object to exclusion of testimony—failure to renew motion to dismiss

Defendant was not denied the effective assistance of counsel because counsel failed to object to the trial court's exclusion of testimony by a defense witness where counsel properly preserved the propriety of the court's ruling for appellate review by making an offer of proof of the excluded testimony, G.S. 15A-1446(a), and where the excluded testimony was clearly irrelevant. Nor was defendant denied the effective assistance of counsel by the failure of counsel to renew his motion to dismiss at the close of all the evidence since it is not necessary to renew motions for nonsuit in order to preserve the issue of the sufficiency of the evidence for appellate review. G.S. 15A-1446(d)(5).

2. Narcotics § 4.3— constructive possession of narcotics—sufficiency of evidence

The State's evidence was sufficient to establish that defendant was in constructive possession of heroin, cocaine and marijuana so as to support his convictions of trafficking in heroin, possession of cocaine and possession of marijuana where it tended to show: 5 ounces of marijuana, .327 grams of cocaine and 5.03 grams of a heroin-quinine mixture were found either in defendant's bedroom or in a sitting room of his home; the heroin-quinine mixture was packaged in glassine bags similar to a supply of such bags found in defendant's bedroom; and a small mixer containing a heroin-quinine residue and a can containing a quinine powder residue were found in defendant's bedroom.

3. Narcotics § 4.1— trafficking in heroin—weight of mixture

Evidence that 5.03 grams of a heroin-quinine mixture were found in defendant's home was sufficient to convict defendant of trafficking in heroin in violation of G.S. 90-95(h)(4)a, it not being necessary to show that the mixture contained 4 grams or more of heroin to convict defendant of such offense.

4. Narcotics § 5— felony possession of marijuana—insufficient verdict

A verdict finding defendant "guilty of possessing marijuana" was insufficient to support a sentence for the felony of possession of more than an ounce of marijuana but would support a sentence only for the misdemeanor of simple possession of marijuana. G.S. 90-95(d)(4).

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APPEAL by defendant from *Burroughs, Judge*. Judgments entered 31 August 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 September 1984.

Defendant was charged with and convicted of trafficking in heroin in violation of G.S. 90-95(h)(4)a, possessing cocaine in violation of G.S. 90-95(a)(3), and possessing more than an ounce of marijuana in violation of G.S. 90-95(d)(4).

The State's evidence tended to show that: On 11 November 1982 officers in the Charlotte Police Department obtained and executed a valid warrant to search Rudy Valley Dorsey's home at 3132 Graymont Drive in Charlotte for narcotics, to wit: 1 ounce of cocaine. At the same address, in addition to the house in which defendant, his wife, and young son, Scotty, lived, was a garage containing defendant's two cars and an office from which defendant operates his cement contracting business. During the search of defendant's home the officers found approximately 5 ounces of marijuana in a bag under a sofa in defendant's bedroom, 0.327 grams of cocaine in a jewelry box in the top drawer of a dresser in his bedroom, and 5.03 grams of a heroin-quinine mixture under the sofa in the sitting room. The heroin-quinine mixture was packaged in 105 small glassine bags, which were grouped in 7 packages of 15 bags each, and each group was secured by a rubber band. Also seized from the defendant's bedroom were 100 glassine bags similar to those containing the heroin-quinine mixture, a small grinder or mixer which contained a residue of a heroin-quinine mixture, and a Planters Pretzel Twist can that contained a residue of quinine powder. The defendant was not present at the time of the search, which began at 3:52 o'clock on the morning of 11 November 1982; but Mrs. Dorsey and two of defendant's children, Scotty, age 11, and Larry Washington, age 35, were present.

Defendant's evidence included testimony by Larry Washington that: From about 8 o'clock in the morning of 10 November until the officers came about 3:30 o'clock the next morning, except for two or three brief absences, he was either in the garage working on defendant's cars, or in defendant's office talking about possible contracting jobs, or in the office sleeping. Defendant's wife, who has a job, was away until about 4:30 that afternoon, but was in the house thereafter. Washington let a woman named Gail

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Cherry or Gail Wells into the house on three occasions during the preceding afternoon or evening to use the bathroom, the key to the house being obtained from defendant each time. Four men, other than Washington and defendant, were on the premises during the day and night of 10 November and the early morning hours of 11 November, but did not go in the house. Defendant was about the premises all day and evening preceding the search, but left about two hours before the officers came and did not return that night.

After giving notice of appeal, defendant's trial counsel, Theo X. Nixon, was permitted to withdraw. For a time thereafter defendant was represented by the Public Defender's office, but before the appeal was perfected he engaged his present counsel, Charles V. Bell.

Attorney General Edmisten, by Assistant Attorney General Thomas J. Ziko, for the State.

Charles V. Bell for defendant appellant.

PHILLIPS, Judge.

Though none of the several assignments of error brought forward by defendant list the exceptions upon which they are based or state where the proceedings complained of can be found in the record, as Rule 10(c) of the N.C. Rules of Appellate Procedure requires, we have nevertheless considered all of the assignments since one of them is that he was denied the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

[1] In support of his claim that he failed to receive the effective assistance of counsel defendant first cites Mr. Nixon's failure to make timely objection to the court's refusal to receive the testimony of Assistant Clerk of Court Mickey Creech, the contention being that the failure to object waived his right to challenge this ruling on appeal. Such is not the law. All that the law requires to preserve exceptions based on the refusal to receive testimony is an offer of proof that states the substance of the refused testimony, G.S. 15A-1446(a); 1 Brandis N.C. Evidence § 26 (1982), and Mr. Nixon made such an offer. Furthermore, the proffered testimony, that Gail Wells had a case in court the morning

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of November 11, 1982, the same day the drug bust was made, and failed to appear, was clearly irrelevant and without probative force, in any event. The evidence was offered in support of defendant's contention that somebody else, most likely Gail Wells, placed the illegal contraband in his house; but no such deduction can properly be drawn from this and the other evidence in the case, and the court's refusal to receive it was proper. Another alleged shortcoming of trial counsel was the failure to "renew" his motion to dismiss at the close of all the evidence, the claim being that counsel thereby waived defendant's right to contest the sufficiency of the evidence on appeal. That is not the law, either, as G.S. 15A-1446(d)(5) makes plain, and the sufficiency of the evidence to convict defendant has been considered, as that statute authorizes. The other failings alleged have no more merit, and this assignment of error is overruled.

[2, 3] Defendant's contention that the evidence was insufficient to support his conviction of any of the charges is founded on the State's alleged failure to prove that he was in constructive possession of the substances seized. But evidence that the two drugs and the heroin-quinine mixture were all in defendant's bedroom or sitting room, that the mixture was systematically packed in bags similar to a supply of empty bags also there, and that close by were several mixing and storage utensils that contained ingredients of the mixture, was sufficient to support the inference that all of the illegal drugs were in defendant's constructive possession. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). The contention that the trafficking in heroin charge should have been dismissed is also based on the claim that the evidence failed to show that the mixture contained more than four grams of heroin, as the statute he was prosecuted under requires. This contention is mistaken. G.S. 90-95(h)(4)a makes it a Class F felony to sell, manufacture, deliver, transport or possess four grams or more of opium or opiate, "including heroin, or *any mixture containing such substance*." (Emphasis supplied.) The evidence shows that 5.03 grams of a heroin quinine mixture were found by the police under defendant's sitting room sofa. And, as was held in *State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981), under this statute it is the weight of the *mixture*, rather than that of the drug itself, that controls. Both of these contentions are therefore overruled, as are the other contentions made by the

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defendant concerning the cocaine and heroin cases. Defendant's convictions of these offenses were without prejudicial error.

[4] But in the marijuana case (82CR74268), the defendant was not sentenced according to law and must be resentenced. Though defendant was charged with possessing more than an ounce of marijuana, a Class I felony, in violation of G.S. 90-95(d)(4), the jury returned a verdict of "guilty of possessing marijuana." Since the only evidence about marijuana tended to show there was more than an ounce, the trial judge treated the verdict as a finding of guilty of possessing more than an ounce of marijuana and sentenced defendant accordingly. In so doing the court erred. An essential element of the felony defendant was tried for was that the amount of marijuana possessed weighed more than an ounce, and in finding defendant "guilty of possessing marijuana," without finding that more than an ounce was possessed, the jury, in effect, found defendant guilty of simple possession of marijuana, a misdemeanor. *State v. Gooch*, 307 N.C. 253, 297 S.E. 2d 599 (1982). We therefore vacate the judgment in this case and remand for sentencing in accord with the verdict.

Case No. 82CR74262—no error.

Case No. 82CR74265—no error.

Case No. 82CR74268—vacated and remanded.

Judges HEDRICK and BECTON concur.

IN THE MATTER OF: THOMAS TRACY WHISNANT, DATE OF BIRTH: 9/8/74

No. 8425DC273

(Filed 20 November 1984)

Rules of Civil Procedure §§ 52, 63— order terminating parental rights—heard by one judge—signed by another—nullity

An order terminating parental rights was signed without authority and is a nullity where the judge signing the order was not present at the hearing and the presiding judge was not disabled and did not make findings of fact. G.S. 1A-1, Rule 52; G.S. 1A-1, Rule 63.

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APPEAL by respondent from *Tate, Judge*. Judgment entered 28 December 1983 in District Court, BURKE County. Heard in the Court of Appeals 23 October 1984.

Powell, Triggs, Clontz & Alexander, P.A., by Douglas F. Powell, for petitioner appellee Department of Social Services.

Cox and Gage, by Robert H. Gage, for respondent appellant Thomas Eugene Whisnant.

VAUGHN, Chief Judge.

This appeal arises from a petition filed by the Burke County Department of Social Services to terminate the parental rights of the mother and father of Thomas Tracy Whisnant. The Department of Social Services was not represented at trial.

The appellant in this case is the father of the child, who contends that it was reversible error for a different judge from the judge who presided at the hearing to sign the order terminating parental rights. We agree. The record shows that Judge Tate stated that although the evidence did not support a finding of neglect, there existed good grounds for terminating respondent's parental rights, namely, non-payment of any child support during the six months next preceding the filing of the petition. Judge Tate also stated that he believed the best interest of the child would be served by the termination of parental rights, and then asked the attorney appearing as guardian *ad litem* on behalf of the child to "prepare an order with the appropriate findings . . . [r]eflecting the broad findings that I announced."

On 28 December 1983, Judge Edward J. Crotty signed the documents that disposed of the case, *i.e.*, the adjudication order and the disposition order. The former contained detailed findings of fact and conclusions of law relating to the termination of respondent's parental rights, and the latter terminated those rights. *See* G.S. 7A-289.30, -.31. Both orders recited that the cause had been heard before Judge Crotty on 20 October 1983, that judgment had been entered on that date, and the order was signed on 28 December 1983. Judge Tate was not mentioned in either order. The orders were filed on 29 December 1983. The record includes a stipulation signed by counsel for all parties that Judge Tate alone presided over the 20 October 1983 hearing, and

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that Judge Crotty was not present. Judge Crotty was without authority to sign the order terminating respondent's parental rights and the order he signed is a nullity. Our decision is not merely consistent with the Rules of Civil Procedure; it is mandated by them.

Rule 52 governs findings by the court in non-jury proceedings. This Rule requires the trial court in such proceedings to do three things: (1) find facts on all issues of fact joined on the pleadings, (2) declare conclusions of law arising on the facts found, and (3) to enter judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149 (1971). This is because when a trial judge sits as "both judge and juror," as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968). Judge Tate presided over the hearing and then announced in open court that respondent's parental rights were terminated. This is not sufficient compliance with the obligations imposed by Rule 52.

Finally, Rule 63, entitled "Disability of a Judge," reads in pertinent part as follows:

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules *after a verdict is returned or findings of fact and conclusions of law are filed*, then those duties may be performed: [those judges with authority to perform such duties are then listed].

Rule 63, N.C. Rules Civ. Proc. (*emphasis added*). Rule 63 does not apply to the situation before us. This is true for two reasons. Judge Tate was neither disabled nor did he ever make findings of fact. The function of a substitute judge is thus ministerial rather than judicial. As this Court observed:

Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only . . . [performing] such acts as are

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necessary under our rules of procedure to effectuate a decision already made. Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision making process.

Bank v. Easton, 12 N.C. App. 153, 155, 182 S.E. 2d 645, 646, cert. denied, 279 N.C. 393, 183 S.E. 2d 245 (1971). *Accord, Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F. 2d 711 (6th Cir. 1977); *Ten-O-Win Amusement Co. v. Casino Theater*, 2 F.R.D. 242 (N.D. Cal. 1942) (both interpreting substantially similar federal rule).

Placement of this child has been delayed for no reason. In fairness to Judge Tate, we note that there is nothing to indicate that a proposed judgment was ever tendered to him. We, however, have no choice.

If Judge Tate is available for assignment, the case will be heard by him. He may consider the transcript of the evidence heretofore heard by him and may take such additional evidence, reports or assessments as he may find to be in the interest of the child to reflect any adjustment made by the child or change in the circumstances during the period of time since the hearing on 20 October 1983. If Judge Tate is not available for assignment to the case, there shall be a hearing *de novo*.

Vacated and remanded.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. RONNIE DALE BREWINGTON

No. 8425SC82

(Filed 20 November 1984)

Criminal Law § 138— mitigating factor—voluntary acknowledgment of wrongdoing—insufficient evidence

In sentencing defendant for involuntary manslaughter and driving left of center, the trial court did not err in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process where the evidence showed only that defendant indicated to

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the investigating officer "that he had been the driver of the black Ford" but failed to show that defendant acknowledged any wrongdoing which contributed to the victim's death, and where defendant pled not guilty at his arraignment and his first admission of guilt came as the result of a plea bargain some four months after the accident. G.S. 15A-1340.4(a)(2).

APPEAL by defendant from *Lewis (John B., Jr.)*, Judge. Judgment entered 29 September 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 26 September 1984.

Defendant was convicted of involuntary manslaughter and driving left of center, violations of G.S. 14-18 and G.S. 20-146 respectively. Defendant was sentenced to a term of imprisonment of six years, three years greater than the applicable presumptive sentence. G.S. 15A-1340.4(f)(6).

On 3 May 1983, defendant, driving a black 1969 Ford automobile, crossed over the center line and collided with an oncoming vehicle driven by 17-year-old Scott Eugene Setzer. Setzer later died of injuries received in that collision. After the accident, defendant remained in the area and was spotted by Trooper Collins of the North Carolina Highway Patrol. Trooper Collins approached defendant and arrested him. Defendant thereafter "indicated to the officer that he had been the driver of the black Ford and that he had been involved previously, shortly before that wreck, in a hit and run accident in Hickory."

On 5 July 1983, defendant was indicted for no fewer than eight related statutory violations. On 25 July 1983, defendant was arraigned and entered a plea of "not guilty" to the offenses charged. On 29 September 1983, however, defendant agreed to plead guilty to the charges of manslaughter and driving left of center in exchange for the dismissal of the remaining charges. No agreement was entered into regarding sentencing.

The trial court accepted the plea and subsequently sentenced defendant to a six-year term of imprisonment. The trial court justified the sentence on the grounds that defendant's prior conviction for uttering false checks constituted an aggravating factor. The court cited no factors in mitigation.

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Attorney General Edmisten, by Robert G. Webb, Assistant Attorney General, for the State.

Ann B. Petersen, Assistant Appellate Defender, Office of the Appellate Defender, for defendant appellant.

VAUGHN, Chief Judge.

The sole issue on appeal concerns defendant's actions subsequent to his arrest at the scene of the accident. Defendant points to statements made to Trooper Collins and contends that he thereby "voluntarily acknowledged wrongdoing" at "an early stage of the criminal process" and that the trial court erred in failing to consider such as a mitigating factor in sentencing. G.S. 15A-1340.4(a)(2)l.

We agree with defendant's statement of the law. For purposes of G.S. 15A-1340.4(a)(2)l, the "criminal process begins with the issuance of a formal written charge against a defendant." *State v. Graham*, 309 N.C. 587, 590, 308 S.E. 2d 311, 314 (1983). A confession made soon after arrest will be deemed to have been made "at an early stage" of the criminal process and *must* be considered by the trial court as a statutory mitigating factor in sentencing. *Graham, supra*; *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

Defendant, however, has ignored a fundamental threshold issue. Defendant has failed to show that the trial court ignored "uncontradicted credible evidence" that he acknowledged wrongdoing. *Jones* at 219, 306 S.E. 2d at 455. *See also State v. Melton*, 307 N.C. 370, 373, 298 S.E. 2d 673, 676 (1983) (mitigating factors must be "proved by the preponderance of the evidence"). In this context, an acknowledgment of wrongdoing connotes an admission of culpability, responsibility or remorse. *See, e.g., Hilkert v. Canning*, 58 Ariz. 290, 119 P. 2d 233 (1941). At the very least, the statutory language requires an admission of guilt. *Graham* at 591, 308 S.E. 2d at 315. In the present case, evidence introduced at the sentencing hearing reveals only that defendant "indicated to the officer that he had been the driver of the black Ford" Defendant did not acknowledge any wrongdoing which contributed to Setzer's death. He did not admit to driving erratically, crossing the center line, or driving while intoxicated. Moreover,

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defendant formally pleaded "not guilty" at his arraignment on 25 July 1983. Defendant's only admission of guilt was made pursuant to a plea bargain agreement on 29 September 1983. This plea was entered four months after the accident and far too late in the "criminal process" to constitute a mitigating factor in itself. See *Graham, supra*.

The trial court's omission of defendant's post-arrest statement as a mitigating factor was not improper. Defendant's request for a new sentencing hearing is therefore denied.

No error.

Judges WHICHARD and JOHNSON concur.

MID-SOUTH CONSTRUCTION COMPANY v. JAMES K. WILSON, D/B/A
WILSON'S NURSERY AND GARDEN CENTER

No. 8411DC85

(Filed 20 November 1984)

1. Venue § 1— contractor's action against subcontractor—contractor's assent to jurisdiction in performance bonds—not exclusive

Performance bonds entered into by plaintiff, the general contractor on a construction project for the Housing Authority of the City of Charlotte, provided that plaintiff assented to being sued in Mecklenburg County on its contract with the Housing Authority and for any claims of subcontractors, laborers, or materialmen, but did not provide that Mecklenburg was the only county in which an action by plaintiff for breach of contract against a subcontractor could be brought.

2. Venue § 1— counterclaim arising from construction contract—proper venue

Where a general contractor has brought a claim against defendant subcontractor in Harnett County on a construction project in Mecklenburg County, G.S. 1A-1, Rule 13(a), which requires defendant to assert its claim against plaintiff as a counterclaim, and G.S. 44A-28, which requires defendant to bring its claim against plaintiff in Mecklenburg County, do not mean that plaintiff's action must be brought in Mecklenburg County. Defendant will not be prejudiced if the counterclaim is tried before the action in Mecklenburg County; a judgment on the counterclaim in Harnett County would be *res judicata* as to the action in Mecklenburg County.

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APPEAL by defendant from *Bailey, Judge*. Judgment entered 22 August 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 23 October 1984.

The defendant appeals from an order denying a motion for change of venue. This action grows out of a construction project for the Housing Authority of the City of Charlotte for which the plaintiff was the general contractor. The plaintiff, whose principal office is in Dunn, North Carolina, brought this action in the District Court of Harnett County for breach of contract against the defendant, a subcontractor on the Charlotte project. The defendant filed an answer and a counterclaim.

The defendant also filed an action in Mecklenburg County pursuant to Art. 3 of Ch. 44A of the General Statutes against the plaintiff alleging the same matters as were alleged in the counterclaim filed in Harnett County. The Housing Authority and Seaboard Surety Company, the surety on the plaintiff's bond filed in connection with the construction project, are defendants in the Mecklenburg County action. The bond provided among other things:

The undersigned Principal and Surety do further hereby consent and yield to the jurisdiction of the Superior Court of Mecklenburg County, North Carolina, and shall assure all undertakings under said agreement or contract, and shall assure and protect all laborers and furnishers of materials on said work, both as required by applicable law.

The plaintiff and Seaboard filed a bond to discharge the lien in Mecklenburg County which provided:

The undersigned Principal and Surety do further hereby consent and yield to the jurisdiction of the General Court of Justice, Mecklenburg County, North Carolina with respect to any claim on this bond or the Original Bond.

The defendant made a motion in the Superior Court of Harnett County to move the action from District Court to Superior Court. He also made a motion for a change of venue to Mecklenburg County. The record does not show that the Superior Court made a ruling on the motion to move the case to Superior Court. The Court denied the defendant's motion for change of venue to Mecklenburg County. The defendant appealed.

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Johnson and Johnson, P.A. by W. A. Johnson and Sandra L. Johnson for plaintiff appellee.

W. Faison Barnes and Richard H. Tomberlin for defendant appellant.

WEBB, Judge.

We held in *DesMarais v. Dimmette*, 70 N.C. App. 134, 318 S.E. 2d 887 (1984) that the denial of a motion for change of venue as a matter of right is immediately appealable. The order denying a change of venue in this case is appealable.

Although the record does not show that an order was signed transferring the case from District Court to Superior Court, we hold that by ruling on the motion for change of venue the Superior Court assumed jurisdiction. This transferred the case from District Court to Superior Court. Neither party has assigned error to the Court's failure to rule on this motion to remove to the Superior Court and we take this as assent by both parties to the transfer.

[1] The defendant first argues that pursuant to the terms of the performance bond and the bond to discharge the lien the plaintiff consented to the jurisdiction of the Superior Court of Mecklenburg County and waived its right to bring the action for breach of contract against the defendant in Harnett County. We do not so read either bond. As we read the bonds the plaintiff assented to being sued in Mecklenburg County on its contract with the Housing Authority and for any claims of subcontractors, laborers, or materialmen. This does not affect an action by the plaintiff for breach of contract by a subcontractor. Assuming that the plaintiff consented to its breach of contract action being brought in Mecklenburg County it did not by the terms of the bond make Mecklenburg the only county in which its action could be brought. The bonds do not say the plaintiff consented to the exclusive jurisdiction of the courts of Mecklenburg County.

[2] The defendant argues further that he is required by G.S. 44A-28 to bring his claim against the plaintiff in Mecklenburg County and that he must under G.S. 1A-1, Rule 13(a) assert it as a counterclaim in the plaintiff's action. He says that for this reason the plaintiff's action must be brought in Mecklenburg County. We

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do not believe that the requirement that the defendant assert his claim as a counterclaim in the action brought by the plaintiff deprives the plaintiff of its right to assert its claim in Harnett County. The defendant will not be prejudiced if the counterclaim is tried before his action in Mecklenburg County. If he gets a judgment in Harnett County on the counterclaim it will be res judicata as to the action in Mecklenburg County.

The defendant argues finally that the Court abused its discretion by denying the motion for change of venue. He bases this contention principally on the first two arguments he advanced. We hold that the Court did not abuse its discretion in denying the motion.

Affirmed.

Judges HEDRICK and HILL concur.

WILLIAM I. HOPPER v. CLARENCE E. MASON AND WIFE, ELIZABETH MASON

No. 8430SC473

(Filed 20 November 1984)

Appeal and Error § 6.2— preliminary injunction—no immediate appeal

Defendants had no right to appeal an order granting a preliminary injunction when they will not be harmed while the injunction is enforced pending trial on the merits. G.S. 1-277; G.S. 1A-1, Rule 65.

APPEAL by defendants from *Burroughs, Judge*. Order entered 3 April 1984 in Superior Court, MACON County. Heard in the Court of Appeals 24 October 1984.

Plaintiff sued defendants for permanent injunctive relief and for damages resulting from the excavation of rock and soil from defendants' land which allegedly formed the lateral support of plaintiff's property. The court imposed a preliminary injunction against defendants pending an adjudication of the merits. Defendants seek to set aside the injunction.

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The preliminary injunction prohibits the removal of any additional rock or soil from defendants' property. The injunction consisted of detailed findings of fact and conclusions of law and subsequently stated:

It is, therefore, ORDERED AND ADJUDGED as follows:

That a preliminary injunction is hereby ordered and issued against Defendants, their assigns, heirs and successors, and such preliminary injunction shall be continued until the hearing on the merits or further order of this Court.

Plaintiff shall post bond in the amount of \$200.00.

At the hearing Mr. Mason was asked: "Do you have any objection to the status quo being maintained, that is, no removal of dirt for several months until this case can be tried . . .?" In response, he stated, "I don't see anything wrong with waiting for a reasonable amount of time." Defendants were in the practice of merely allowing contractors to remove the soil and, since 1980, had neither received nor expected payment in exchange. Defendants nevertheless seek to vacate the injunction on appeal.

Herbert L. Hyde, for defendant appellant.

Mayer & Magie, by Roderic G. Magie, for plaintiff appellee.

VAUGHN, Chief Judge.

Defendants object to the preliminary injunction on two grounds. Defendants first contend that the injunctive order is not specific in its terms and does not properly describe the act or acts to be enjoined. G.S. 1A-1, Rule 65(d). *See, e.g. Gibson v. Cline*, 28 N.C. App. 657, 222 S.E. 2d 478 (1976); *Resources, Inc. v. Insurance Co.*, 15 N.C. App. 634, 190 S.E. 2d 729 (1972). They suggest that this required specificity must be contained in the decretal portion of the injunction. Defendants also claim that the trial court erred in setting plaintiffs bond at \$200. The record reveals that the trial judge mistakenly assumed that a bond in that amount was required by statute. Defendants contend that the court thereby failed to exercise any discretion whatsoever and that this failure is fatal to the validity of the order. *Keith v. Day*, 60 N.C. App. 559, 299 S.E. 2d 296 (1983).

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The merits of defendants' claim are not before us. As a threshold issue, it is clear that an appeal does not lie from Judge Burroughs' order granting the preliminary injunction. A "preliminary injunction" is an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits. G.S. 1A-1, Rule 65; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975); *Setzer v. Annas*, 286 N.C. 534, 212 S.E. 2d 154 (1975). G.S. 1-277, in turn, provides that no appeal lies from an interlocutory order unless such ruling or order deprives an appellant of a "substantial right" which may be lost if appellate review is disallowed. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980); *Pruitt, supra*.

In the present case, defendants will not be harmed while the injunction is enforced pending trial. At the hearing, Mr. Mason stated that he "[didn't] see anything wrong with waiting for a reasonable amount of time" before soil removal operations could resume. Defendants have simply been asked to temporarily withdraw their permission for the gratuitous removal of soil by third parties. *Cf. Ball v. Ball*, 55 N.C. App. 98, 284 S.E. 2d 555 (1981) (preliminary injunction requiring appellants to allow a neutral third party to enter their land does not involve a substantial right and is not appealable).

We recognize that the language of an injunctive order may be so unclear that a party is, in good faith, unable to follow the trial court's directives in the absence of clarifying instructions. This factor, however, is not present in the case before us. Defendants are clearly aware of what is expected of them. In the absence of either confusion or harm, real or threatened, these defendants will not be permitted to challenge this interlocutory injunctive order on appeal.

Appeal dismissed.

Judges BRASWELL and EAGLES concur.

Callaway v. Freeman

CLARK CALLAWAY, D/B/A CLARK'S SEAFOODS v. ELLEN FREEMAN, D/B/A
HARBORSIDE RESTAURANT

No. 843DC130

(Filed 20 November 1984)

Rules of Civil Procedure § 60.2— motion to set aside judgment—no notice of trial calendar

Defendant's motion to set aside a judgment against her for mistake and excusable neglect should have been granted where the record shows that defendant never received a trial calendar notice and did not know the case had been calendared for trial, and where there was a clear violation of Rule 2(b) of the General Rules of Practice for the Superior and District Courts, which require that civil calendars be published and distributed no later than four weeks prior to the first day of court. G.S. 1A-1, Rule 60(b).

APPEAL by defendant from *Lumpkin, Judge*. Judgment entered 23 November 1983 in CARTERET County District Court. Heard in the Court of Appeals 25 October 1984.

On 13 April 1983, plaintiff filed and properly served upon defendant a complaint in which plaintiff alleged defendant purchased various items of seafood from plaintiff for use in defendant's restaurant business and that defendant owed plaintiff \$2,848.00 on open account. Subsequently, defendant sent a letter to plaintiff informing plaintiff that: "Harbour Side Inc. ceased to be the management corporation of Harbour Side Restaurant effective Feb. 28, 1983. Harbour Side Restaurant went out of business effective May 7, 1983. I, Ellen Freeman am not responsible for corporate debts." The case was subsequently calendared for trial. Defendant did not appear at trial; plaintiff offered evidence at trial. At the conclusion of the trial, the court entered judgment for plaintiff in the amount alleged to be due. Defendant subsequently filed a motion to set the judgment aside, which motion was denied by the trial court. From denial of her motion, defendant has appealed.

L. Patten Mason for plaintiff.

Ward and Smith, P.A., by Kenneth R. Wooten, for defendant.

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WELLS, Judge.

Defendant contends that her N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure motion to set the judgment aside should have been granted because of her mistake and excusable neglect and because of the misconduct of plaintiff. We do not address the misconduct issue, but hold that defendant did show excusable neglect, and reverse.

The record before us shows that defendant clearly demonstrated that she never received a trial calendar notice and did not know the case against her had been calendared for trial. The record also shows that the case was calendared for trial on 11 July 1983, following a request by plaintiff's attorney, dated 8 July 1983, and that the case was calendared for trial on 25 July 1983. This was a clear violation of Rule 2(b) of the General Rules of Practice for the Superior and District Courts, which requires that civil calendars shall be published and distributed to attorneys of record (or party where there is no attorney of record) "no later than four weeks prior to the first day of court." Under these circumstances, defendant was unfairly and unlawfully denied the opportunity to appear and defend the action against her. The interest of justice requires that the order of the trial court denying defendant's Rule 60(b) motion be reversed, that the judgment against defendant be vacated, and that this case be remanded for proper calendaring for trial.

Reversed, judgment vacated, and remanded.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. VICTOR LEE FORD, JR.

No. 8412SC185

(Filed 20 November 1984)

Criminal Law §§ 78, 141.1— stipulation of prior convictions—higher degree of crime

In a prosecution for breaking or entering two coin-operated machines, defendant's stipulation, pursuant to G.S. 15A-928, that he had been convicted

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of breaking into coin-operated machines on three earlier occasions was not ineffective because it was made immediately before the trial began and not "after commencement of the trial and before the close of the State's case" as the statute provides; therefore, defendant was bound by the stipulation, and he was convicted in the present case of felonies rather than misdemeanors. G.S. 14-56.1.

APPEAL by defendant from *Johnson, Judge*. Judgments entered 27 April 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 October 1984.

Defendant was convicted of breaking into two coin-operated machines in violation of G.S. 14-56.1.

Attorney General Edmisten, by Associate Attorney General Barbara Peters Riley, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

PHILLIPS, Judge.

G.S. 14-56.1 provides that one who breaks or enters a coin-operated machine with the intent to steal any property therein shall be guilty of a general misdemeanor unless he has been convicted of violating the statute before, in which case the offense is a Class H felony. The primary indictment charging defendant with two violations of this statute was supplemented by a special indictment in accord with G.S. 15A-928, alleging that he had been convicted of the same offense on three prior occasions. The defendant's convictions under the primary indictment are not contested by this appeal; the only question presented is whether the crimes he was convicted of were felonies, as the court ruled, or misdemeanors, as defendant contends. Defendant's contention is based on the State's alleged failure to prove that defendant had been convicted of the same offenses before. But the State did not have to prove the prior convictions, because the defendant and his lawyer stipulated to them in open court. *State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961). Immediately before the trial began, as the record shows, defendant's counsel stipulated that the special indictment's allegation that defendant had been convicted of breaking into coin-operated machines on three earlier occasions, as specified therein, was correct; after which the court

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discussed the implications of the stipulation and asked defendant if he understood and agreed to it, and defendant answered, "Yes, sir" to both questions.

The procedure followed with respect to the prior convictions was authorized by G.S. 15A-928, and defendant's contention that the stipulation was ineffective because it was not made "after commencement of the trial and before the close of the State's case," as that statute provides, is without merit. The purpose of that statute, which is for the benefit of defendants charged with prior convictions, is not to require that the procedures referred to therein be accomplished at a certain time and no other, which would be pointless. Its purpose is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit or deny them before the State's evidence is concluded; because, as the statute makes plain, if the convictions are denied, the State can then present proof of that element of the offense to the jury, but cannot do so if the prior convictions are admitted. Since the record clearly shows that defendant was accorded the opportunity that the statute requires and chose to admit the convictions, rather than permit the jury to be informed about them, he is bound thereby.

[N]othing in the State or Federal Constitutions nor in our case law prevents the defendant himself from making a judicial admission or stipulating to an undisputed fact, albeit the fact is essential to the State's case.

State v. Smith, 291 N.C. 438, 441, 230 S.E. 2d 644, 646 (1976).

No error.

Judges HEDRICK and BECTON concur.

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STATE OF NORTH CAROLINA v. VERNON LYNN LUNSFORD

No. 8419SC151

(Filed 20 November 1984)

Criminal Law § 138— failure to find mitigating factor—evidence insufficient

There was no error in the court's failure to find as a mitigating factor that prior to arrest or at an early stage in the criminal process defendant voluntarily acknowledged wrongdoing where the only evidence that defendant acknowledged his participation did not show when he did so. G.S. 15A-1340.4(a)(2)l (1983).

APPEAL by defendant from *Helms, William H., Judge*. Judgment entered 26 October 1983 in ROWAN County Superior Court. Heard in the Court of Appeals 16 October 1984.

Defendant pled guilty to and was convicted of two counts of breaking and entering and was sentenced to a term of eight years.

Attorney General Rufus L. Edmisten, by Associate Attorney General Victor H. E. Morgan, Jr., for the State.

Ford & Parrott, by Larry G. Ford, for defendant.

WELLS, Judge.

In his sole assignment of error, defendant contends that the trial court erred in sentencing him to a term of imprisonment in excess of the statutory presumptive term. More particularly, defendant contends that the trial court erred in failing to find as a mitigating factor that prior to arrest or at an early stage in the criminal process defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, under the provisions of N.C. Gen. Stat. § 15A-1340.4(a)(2)l (1983).

From the record before us, it does not appear that defendant offered any evidence on this issue. The record of evidence we have indicates that the District Attorney stated to the court that defendant did make a statement to a law enforcement officer acknowledging his participating in the break-ins. The District Attorney's statement does not, however, show when defendant made his confession. Under these circumstances, defendant has not carried his burden of showing this mitigating factor to be

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established. *See State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984).

The judgment of the trial court is

Affirmed.

Judges ARNOLD and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 NOVEMBER 1984

BREWINGTON v. SMITH No. 8412DC36	Cumberland (82CVD2123)	Reversed & Remanded
CLEMONS v. WILLIAMS No. 843SC4	Pitt (79CVS1088)	No Error
CONDREY v. LEE RAY BERGMAN RENTAL No. 8414DC124	Durham (83CVD2042) (83CVM7138)	Remanded
FOOD TOWN STORES v. CITY OF SALISBURY No. 8419SC146	Rowan (83CVS259) (83CVS242) (83CVS258)	Affirmed
IN RE CHILDRESS No. 8425DC626	Caldwell (81J70)	Reversed
IN RE DAIL & WILLIAMS No. 843DC724	Craven (83J74) (83J75)	Affirmed
IN RE MAY No. 8418DC206	Guilford (77J474) (77J475) (82J014)	Affirmed
JOHNSON v. MANNING No. 8430DC216	Jackson (81CVD334)	Reversed & Remanded
LEAK v. CLOVERDALE FORD, INC. No. 8421SC43	Forsyth (82CVS7199)	Affirmed
MID-SOUTH CONSTR. v. AIR MASTERS No. 8411SC86	Harnett (83CVS0227)	Affirmed
MID-SOUTH CONSTR. v. REA BROTHERS No. 8411SC87	Harnett (83CVS0226)	Affirmed
NORTHWESTERN BANK v. HAMM No. 8423DC444	Ashe (83CVD60)	Affirmed
PARRISH v. PARRISH No. 8421DC202	Forsyth (83CVD1441)	Affirmed
PLUMMER v. LAYE No. 8327SC1301	Gaston (81CVS1936)	No Error

SCOTT v. MARTIN No. 8422DC192	Davidson (83CVD1225)	Appeal Dismissed
STANLEY v. LUNDY PACKING CO. No. 844SC136	Sampson (83CVS179)	Reversed
STATE v. ALLEN No. 8421SC770	Forsyth (83CRS23449)	No Error
STATE v. BERRY No. 8425SC614	Catawba (83CRS18490)	No Error
STATE v. BISHOP No. 8428SC506	Buncombe (81CRS3143)	Affirmed
STATE v. BLOCKER No. 8412SC450	Cumberland (83CRS43643)	No Error
STATE v. BROWN No. 8426SC380	Mecklenburg (82CRS51544)	No Error
STATE v. BURCH No. 8414SC562	Durham (82CRS27776)	No Error
STATE v. CAMPBELL No. 8412SC378	Cumberland (83CRS18659)	No Error
STATE v. JACOBS No. 8416SC560	Robeson (83CRS12439) (83CRS12440) (83CRS12441) (83CRS12442)	No Error
STATE v. LONGCRIER No. 8425SC475	Catawba (83CRS15371)	No Error
STATE v. MANDEL No. 845SC518	New Hanover (83CRS20619)	No Error
STATE v. MESSER No. 8428SC471	Buncombe (83CRS21866)	Affirmed
STATE v. MULWEE No. 8427SC660	Gaston (84CRS0391)	No Error
STATE v. NORRIS No. 8413SC600	Bladen (83CRS3267)	No Error
STATE v. SETZER No. 8425SC421	Catawba (83CRS14316) (83CRS14317) (83CRS14318)	No Error
STATE v. STRICKLIN No. 844SC634	Onslow (84CRS284)	No Error

STATE v. STUBBS No. 8419SC494	Montgomery (83CRS1605)	No Error
STATE v. TURNER No. 8419SC385	Rowan (83CRS2447) (83CRS2448)	No Error
STATE v. VICK No. 847SC605	Edgecombe (83CRS1749)	Appeal Dismissed
STATE v. WATTS No. 8425SC499	Catawba (83CRS14819)	No Error
TERRY BROTHERS CONTR. v. NC DIV. MOTOR VEHICLES No. 8428SC78	Buncombe (83CVS188)	Affirmed
WINSLOW v. JOLLIFF No. 841DC715	Perquimans (80CVD47)	Reversed
XEROX CORP. v. SEAFARE CORP. No. 841DC539	Dare (83CVD39)	Affirmed

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HAYWOOD A. CANNON v. JEFFREY L. MILLER

No. 833SC908

(Filed 4 December 1984)

1. Husband and Wife § 28— criminal conversation—sufficiency of evidence

The trial court erred in entering summary judgment for defendant in an action for criminal conversation where plaintiff's forecast of evidence tended to show acts of sexual intercourse by defendant with plaintiff's wife between the time of the separation and the divorce of plaintiff and his wife, and defendant failed to present evidence showing his lack of sexual intercourse with plaintiff's wife during such time.

2. Husband and Wife § 24— alienation of affections—summary judgment improperly granted

Summary judgment was improperly granted for defendant on plaintiff's claim for alienation of affections where the parties presented conflicting forecasts of evidence with respect to whether a genuine love and affection existed between plaintiff and his wife and whether the loss of this love and affection was caused by defendant's conduct.

3. Husband and Wife § 26— alienation of affections—compensatory and punitive damages

Plaintiff's forecast of evidence showing adultery in his action for alienation of affections was sufficient evidence of "malicious conduct" to support a recovery of compensatory damages, and his forecast of evidence that defendant became involved with plaintiff's wife with knowledge that she was married to plaintiff and had a small child, and that defendant persisted in this conduct after plaintiff confronted defendant and attempted to discourage him from pursuing plaintiff's wife was sufficient to raise an issue as to punitive damages.

4. Husband and Wife §§ 24, 27— alienation of affections—criminal conversation—actions judicially abolished

There is no longer any legal or logical basis for the retention of the causes of action for alienation of affections and criminal conversation, and these tort actions are, therefore, abolished.

APPEAL by plaintiff from *Bruce, Judge*. Judgment entered 28 March 1983 in Superior Court, PITT County. Heard in the Court of Appeals 11 May 1984.

On 14 September 1982, the plaintiff, acting *pro se*, instituted this action against the defendant, a licensed attorney, for alienation of affections and criminal conversation, seeking actual and punitive damages for each alleged cause in the total amount of \$250,000. Essentially, the complaint alleged that the plaintiff, Haywood Cannon, and Rachel Beaman were married in May of

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1975, had one child born in November of 1978 and lived together as husband and wife until January 1980. The Cannons were subsequently divorced on 20 May 1981.

In support of his first cause of action for alienation of affections, plaintiff alleged the following: In May of 1979, his wife became employed as a Deputy Clerk in the Pitt County Courthouse. The defendant is an attorney practicing law in and around Pitt County and he became acquainted with plaintiff's wife sometime during the summer of 1979. In late September or early October of 1979, the defendant persuaded the plaintiff's wife to have sexual relations with him; this "affected the will" of plaintiff's wife and caused her "to transfer her love, loyalty and devotion from this plaintiff to the defendant" and by mid-October 1979, the influence was so strong that plaintiff's wife showed an "obvious loss" of the genuine love and affection that had existed during the marriage until that time.

In support of his second cause of action for criminal conversation, plaintiff alleged that on numerous occasions prior to 20 May 1981, defendant and plaintiff's spouse had sexual intercourse. Both causes of action were supported by allegations detailing the various injuries suffered by plaintiff as a result of the alleged wrongful behavior of the defendant and plaintiff's wife.

The defendant filed preliminary motions to dismiss, to strike, and for summary judgment. In support of his motion to dismiss, defendant contended that the causes of action were unconstitutional under the state and federal constitutions, or in the alternative that they were violative of the public policy and laws of North Carolina. Accompanying defendant's motions were three supporting affidavits and two exhibits, consisting of two prior court orders entered in connection with the Cannons' divorce proceedings. Together, these documents tended to show that the Cannons were not happily married; that they had permanently separated as of 15 October 1979; and that defendant only became acquainted with Mrs. Cannon after their separation.

Plaintiff promptly filed a response to the motion for summary judgment, contending *inter alia*, that defendant had failed to respond to the cause of action for criminal conversation. In addition, plaintiff filed his own affidavit which flatly contradicted the factual assertions in defendant's affidavits.

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On 17 January 1983, defendant's Rule 12 motions were heard and denied, and his motion for summary judgment was continued until 28 March 1983. On 20 January 1983, the defendant filed an answer and counterclaim, making general denials of all allegations and claiming defamation and abuse of process on the basis of the allegations in plaintiff's complaint. Various discovery requests and pre-trial motions were thereafter filed by each party. On 21 March 1983, plaintiff's motion to continue the summary judgment hearing was denied, as was the defendant's motion to dismiss plaintiff's causes of action.

The trial court ruled on defendant's motion for summary judgment on 28 March 1983. The order states:

The court has reviewed the entire court file in this cause, other court files involving the plaintiff and his former spouse, all of the Affidavits filed herein, and further has heard extensive argument offered both by plaintiff, on his own behalf, and by defendant's counsel.

Upon the foregoing, the court finds that there is no genuine issue of fact upon either the cause of action of alienation of affection or criminal conversation prior to October 15, 1979, and that defendant's motion for summary judgment should therefore be granted.

The plaintiff excepted and appeals from the order granting summary judgment in favor of defendant, and the defendant has cross-assigned error and appeals the denial of defendant's motions to dismiss the plaintiff's causes of action.

Haywood A. Cannon, pro se, for plaintiff appellant.

Dallas Clark, Jr.; and James M. Roberts, by James M. Roberts and Jeffrey L. Miller, pro se, for defendant appellee.

JOHNSON, Judge.

The plaintiff's appeal presents the question of whether the trial court erred in granting summary judgment in favor of defendant on the plaintiff's claims for alienation of affections and criminal conversation. The defendant's appeal primarily raises the question of whether these causes of action, sometimes referred to as "heart balm" torts, should be judicially abolished in this

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jurisdiction. Because we are of the opinion that summary judgment was erroneously entered in favor of the defendant, we must also address the question presented by the defendant. For the reasons set forth below, we conclude that there is no longer any legal or logical basis for the retention of the causes of action for alienation of affections and criminal conversation and that these tort actions should, therefore, be abolished in this jurisdiction. We first address the plaintiff's appeal.

I

Plaintiff has presented a number of procedural questions for review, however, we need not address these in light of our ultimate disposition of this appeal. Therefore, we turn directly to his substantive contentions.

The plaintiff contends that the trial court erred in granting summary judgment in favor of defendant because the evidentiary forecast disclosed the existence of genuine issues of material fact as to each of plaintiff's causes of action. We agree.

Rule 56(c) of the Rules of Civil Procedure provides, in pertinent part, that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court; his papers are to be carefully scrutinized and those of the opposing party are on the whole indulgently regarded. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). This burden may be met by the movant by either (1) proving that an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *City of Thomasville v. Lease-A-Fex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980); *Moore v. Fieldcrest, supra*. The device of summary judgment effectively forces the non-moving party to produce a forecast of the evidence which he has available for presentation at trial to support his claim or defense. *Moore v. Fieldcrest, supra* at 470, 251 S.E. 2d at 422. Rule 56 authorizes the trial court to deter-

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mine only whether a genuine issue of facts exists; it does not authorize the court to decide an issue of fact. *Id.*

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is disclosed. *Id.* Claims or defenses which are not well suited to summary judgment are those in which the determination of essential elements of these claims or defenses rests within the peculiar expertise of fact finders. "Thus if there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied." *City of Thomasville v. Lease-A-fex, Inc.*, *supra* at 655, 268 S.E. 2d at 193-94; *Moore v. Fieldcrest*, *supra* at 470, 251 S.E. 2d at 422. Under these standards, the defendant, as the moving party, must initially either (1) prove that an essential element of plaintiff's claims for alienation of affections and criminal conversation is nonexistent or (2) show that a forecast of the evidence indicates that plaintiff will not be able to prove facts giving rise at trial to all essential elements of the claims alleged.

An action for alienation of affections is comprised of wrongful acts which are said to deprive a married person of the affections of his or her spouse, including love, society, companionship and comfort. 2 Lee, N. C. Family Law, § 207, p. 553-54 (1980). In order to sustain a cause of action for alienation of affections, the plaintiff must show the following facts:

- (1) that he [plaintiff] and his wife were happily married and that a genuine love and affection existed between them;
- (2) that the love and affection so existing was alienated and destroyed;
- (3) that the wrongful and malicious acts of the defendant produced and brought about the loss and alienation of such love and affection.

See *Hankins v. Hankins*, 202 N.C. 358, 162 S.E. 766 (1932); *Heist v. Heist*, 46 N.C. App. 521, 265 S.E. 2d 434 (1980); *Warner v. Tor-*

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rence, 2 N.C. App. 384, 163 S.E. 2d 90 (1968). In this context, the term "malice" does not necessarily mean that which proceeds from a spiteful, malignant, or revengeful disposition, but merely implies conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct is unjustifiable, and actually caused the injury complained of, malice in law will be implied. (Citations omitted.) *Cottle v. Johnson*, 179 N.C. 426, 429, 102 S.E. 769, 770 (1920). The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections; it is sufficient if that conduct is the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the alienation. *Bishop v. Glazener*, 245 N.C. 592, 96 S.E. 2d 870 (1957); *Heist v. Heist*, *supra*. It is also sufficient if there is no more than a partial loss of the spouse's affections. 2 Lee, *supra* at 554.

The term "criminal conversation" is synonymous with "adultery"; the cause of action is founded on the violation of the right of exclusive sexual intercourse between spouses. *Cottle v. Johnson*, *supra*; 7 Strong's N. C. Index 3d, Husband and Wife, § 27, p. 84. The elements of the cause of action for criminal conversation are as follows:

- (1) the actual marriage between the spouses;
- (2) sexual intercourse between defendant and plaintiff's spouse during coverture.

Sebastian v. Kluttz, 6 N.C. App. 201, 209, 170 S.E. 2d 104, 108 (1969). Alienation of affection is not a necessary element. *Id.*

A valid separation agreement entered into between the spouses will not necessarily bar an action for alienation of affections or for criminal conversation which occurred prior to the separation. *Sebastian v. Kluttz*, *supra*; 2 Lee, *supra* at 567; 7 Strong's N. C. Index, *supra* at 84-85. Moreover, the mere fact of separation will not bar an action for criminal conversation occurring during the separation. *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938); 2 Lee, *supra* at 568. The consent of the participating spouse is not recognized as a defense to either the action for alienation of affections, *Chestnut v. Sutton*, 207 N.C. 256,

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176 S.E. 743 (1934), or to the action for criminal conversation, *Bryant v. Carrier, supra*.

The defendant submitted three affidavits in support of his motion for summary judgment; two from Rachel Beaman, plaintiff's ex-wife, and one from defendant himself. Ms. Beaman, in her first affidavit, stated that she and the plaintiff had separated or discussed separations several times during the marriage; that since 1976 the marriage was troubled and discordant; that she and the plaintiff had a fundamental difference over matters of religious beliefs and lifestyle; that there had been violent episodes between them; and that the couple had initially separated in May of 1979 and did not live together thereafter. Ms. Beaman also stated that she had begun to date various other men in the late fall of 1979 and early January of 1980. She became acquainted with Jeffrey Miller, the defendant, in December of 1979 and first dated him in February of 1980. Attached to the affidavit as exhibits are copies of two judgments relating to the Cannons' divorce proceedings. The first judgment was entered on 19 March 1981 in the District Court of Greene County. The court found that the parties had initially separated in May of 1979; that Mrs. Cannon established a separate residence for herself, with plaintiff residing on his parents' property; and that the parties had attempted a reconciliation between May and 15 October 1979. Thereafter, the court found that the parties have lived totally separate and apart. Additionally, the judgment recited several instances of marital quarrelling between Rachel and Haywood Cannon that had occurred during the late spring and summer of 1980 as they related to the issue of the fitness of the parents as custodians of their minor child. Based upon its findings, the court granted Rachel Cannon a divorce from bed and board from Haywood Cannon and custody of the parties' minor child. The second exhibit consists of a judgment entered 20 May 1981, granting Rachel Cannon an absolute divorce from the plaintiff; the court finding that the action was instituted in October of 1980, and the jury having found that the parties had been living separate and apart for one year prior to the bringing of the action (October 1979).

In response, plaintiff filed his own affidavit which essentially contradicted all of the assertions of his ex-wife regarding the quality of their marital relationship, the reasons for their separation, and the ultimate failure of the parties to successfully recon-

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cile their marital differences. Plaintiff indicated that the marriage had been a normally happy one until the advent of defendant's wrongful interference and that defendant had become acquainted with his ex-wife prior to December of 1979. Further, that defendant continued to see plaintiff's wife after plaintiff requested that he cease seeing her. Plaintiff alleged that he had photographs, home movie films, detective reports and other evidence proving that his marriage had been happy and that the defendant was intimately involved with plaintiff's wife from late September or early October of 1979 onward. Attached as exhibits were several letters written by Mrs. Cannon to various friends or relatives indicating satisfaction with her marriage prior to October 1979.

The defendant then filed his own affidavit indicating that prior to December of 1979, his only contact with Mrs. Cannon was of a professional nature; Rachel Cannon was employed as a Deputy Clerk in the office of the Clerk of Superior Court, Pitt County and defendant would occasionally have contact with her in her official capacity in the course of his duties in representing clients in the Pitt County courts. Defendant stated that he inquired about Rachel Cannon in December of 1979 and was told that she was separated from her husband and dating others; that he did not date her until February of 1980, at which time she told him that she had been separated since May of 1979, and that she no longer loved Mr. Cannon. Defendant did not begin to date Mrs. Cannon regularly until March of 1980; it was his impression that she would soon be filing for divorce and it was never defendant's intention to interfere with or alienate any affection Mrs. Cannon had for Mr. Cannon.

Neither the Miller affidavit, nor the Beaman affidavit contain any response to the plaintiff's allegations that they had engaged in sexual intercourse during the period of time between late September 1979 and May of 1981. Plaintiff's ex-wife provided another affidavit to explain that the circumstances surrounding the taking of a family photograph in the summer of 1980 and submitted by plaintiff belie the apparent harmony of the image.

Plaintiff thereafter filed his answer to defendant's interrogatories on 23 March, in which he listed, *inter alia*, names of two private detectives who would testify and respond to a request to list the specific dates and places of each alleged act of

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sexual intercourse occurring between defendant and Rachel Beaman prior to 20 May 1981, by listing several that took place between late September of 1979 and 20 May 1981; the 1979 incidents having been observed by plaintiff himself. Plaintiff also listed the names of various witnesses who would testify on his behalf.

[1] In ruling on defendant's motion for summary judgment, the trial court apparently assumed that the last relevant date was the date of the Cannons' separation on 15 October 1979. Clearly, with respect to the cause of action for criminal conversation, this ruling was erroneous because the mere fact of separation will not bar an action for criminal conversation occurring during the separation. *Bryant v. Carrier, supra*. The forecast of defendant's evidence on this claim is completely devoid of any factual allegations regarding the lack of sexual intercourse between Mrs. Cannon and defendant during the period of time between the separation on 15 October 1979 and the Cannons' divorce in May of 1981. Plaintiff's forecast of the evidence indicates that he will be able to present facts at trial giving rise to all essential elements of the claim of criminal conversation. No "fatal weakness" has been disclosed regarding this claim; the question remaining concerns solely the sufficiency of plaintiff's circumstantial evidence of acts of sexual intercourse and the weight and credibility to be afforded this evidence. These are questions properly to be resolved by the trier of fact and not by the court on motion for summary judgment. Defendant failed to carry his burden with respect to this claim and summary judgment was, therefore, erroneously entered in his favor.

[2] The question with respect to the evidentiary forecast on the alienation of affections cause of action is a much closer one. Clearly, the crucial question in this case is the significance of the plaintiff's separation from his wife on 15 October 1979 with respect to the factual issues of (1) whether theirs was a "happy marriage," in which "genuine love and affection" existed between the marital partners and (2) whether the loss of this love and affection was causally related to the conduct of the defendant. It is readily apparent that a determination of the essential elements of this claim—the existence of "genuine love and affection"—is by nature ill-suited to resolution on motion for summary judgment. If such a determination is legally feasible at all, *see discussion infra*,

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it is surely one which rests within the "peculiar expertise of fact finders." *City of Thomasville v. Lease-Afex, Inc., supra*.

Moreover, the evidentiary forecast on these issues was entirely conflicting. The plaintiff alleged, in both his pleading and affidavit, that defendant and plaintiff's wife became well acquainted in late September or early October of 1979; that they engaged in sexual intercourse from that time until well into the fall of 1980; and that this conduct, together with other actions by the defendant, caused the alienation of the genuine love and affection, theretofore existing between plaintiff and his wife. The defendant's evidentiary forecast clearly controverted these factual allegations, but it did not establish the lack of genuine love and affection between the Cannons as a matter of law.

It must be remembered that the papers of the non-moving party are to be "indulgentlly regarded." *Moore v. Fieldcrest, supra*. The allegations in plaintiff's affidavit were sufficient to raise a genuine issue on his claim. A final determination on the merits of this claim will obviously turn upon the credibility of the witnesses and the weight of the evidence. It is not for the court to decide these issues of fact at the summary judgment hearing, but only to determine whether they exist. Therefore, summary judgment was also improperly granted on plaintiff's cause of action for alienation of affections.

[3] Defendant also argues that plaintiff's forecast of evidence fails to show circumstances of aggravation in addition to the malice implied by law necessary to support the issue of punitive damages on the alienation of affections claim. Again, we do not agree.

Punitive damages are to be awarded in an alienation case only when there are some features of aggravation in the conduct of the defendant, as when the act is done wilfully and evidences a reckless and wanton disregard of the plaintiff's rights. *Powell v. Strickland*, 163 N.C. 395, 79 S.E. 872 (1913); *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E. 2d 142 (1982); *Sebastian v. Kluttz, supra*.

Plaintiff's forecast of evidence indicates that he will seek to prove adultery as an element in his alienation of affections claim. This is sufficient evidence of "malicious conduct" to support the recovery of compensatory damages. *Scott v. Kiker, supra*. Plain-

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tiff's affidavit alleges that defendant interfered with his marriage; became involved with Mrs. Cannon in the latter half of September 1979, with knowledge that she was married to plaintiff and that they had a small child; and that defendant persisted despite plaintiff's confronting defendant and attempting to discourage him from pursuing plaintiff's wife. These allegations are sufficient to raise the issue of whether defendant recklessly disregarded the plaintiff's marital rights. Therefore, summary judgment was erroneously granted as to both causes of action for compensatory and punitive damages.

II

[4] Defendant's cross-appeal presents the question of whether the causes of action for alienation of affections and criminal conversation should be abolished. Although the two actions have long been judicially recognized in North Carolina, the continued validity of these actions has yet to be examined by our courts.¹ We believe that a review of the historical and theoretical bases of the actions will be helpful in the understanding of our decision that these causes of action should be abolished.

A

The torts of alienation of affections and criminal conversation both involve intentional interference with the marital relationship. Both actions are said to compensate for injuries described as loss of "consortium" and both purportedly serve to prevent as well as punish intentional interference with the husband-wife relationship and the violation of accepted canons of social conduct. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 Mich. L. Rev. 979, 988-89 (1935). Historically, however, the actions were independent, each purported to protect a distinct interest and each involved different elements of proof and defense. Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 Ariz. L. Rev. 323 (1981) [hereinafter cited as Note, *Alienation of Affections and Criminal Conversation*].

Alienation of affections developed, in part, out of the husband's right to an action against one who intentionally "enticed"

1. In *Scott v. Kiker*, 59 N.C. App. 458, 464, 297 S.E. 2d 142, 147 (1982), the defendant sought to question the validity of the actions, but failed to properly present this issue for appellate review.

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his wife to leave the home, or physically abducted her. See Feinsinger, *supra* at 992; Prosser and Keeton, *The Law of Torts*, § 124, pp. 918-19 (5th ed. 1984). The common law action for enticing was based upon the deprivation of the husband's right to his wife's services and "consortium." It was judicially adopted in every state except Louisiana.² The action for enticement was permitted in North Carolina as early as 1849 in the case of *Barbee v. Armstead*, 32 N.C. (10 Ired.) 530 (1849). In that case, recovery of damages to the husband was allowed despite the fact that the evidence indicated that he had not provided well for his wife and that she was not taken away against her will. In other words, the plaintiff's fault and the "enticed" spouse's consent to the defendant's actions did not constitute defenses to the action.

The action for alienation of affections in North Carolina does not require either the physical separation of the parties or the commission of an act of adultery. See Part I of this opinion. The action may be brought against the parents or close relatives of one of the spouses for any intentional interference with the marital relation itself. See, e.g., *Bishop v. Glazener*, 245 N.C. 592, 96 S.E. 2d 870 (1957) (husband against father-in-law); *Ridenhour v. Miller*, 225 N.C. 543, 35 S.E. 2d 611 (1945) (wife against sisters-in-law); *Hankins v. Hankins*, 202 N.C. 358, 162 S.E. 766 (1932) (wife against mother-in-law and father-in-law). The gravamen of this action is said to be the deprivation of the plaintiff's "conjugal right to the society, affection, and assistance" of his or her spouse. *Cottle v. Johnson*, *supra* at 428, 102 S.E. at 770; see also *Brown v. Brown*, 124 N.C. 19, 32 S.E. 320 (1899).

The origins of the tort of criminal conversation are somewhat more picturesque than those of alienation of affections. The basis of this action is adultery between the defendant and the plaintiff's spouse. The historical provision of a remedy in the form of money damages for adultery as a substitute for the right of the husband among the primitive European tribes to publicly and physically punish the offending parties and/or obtain a new wife is fully discussed in Lippman, *The Breakdown of Consortium*, 30 Colum. L. Rev. 651 (1930) and Comment, *Piracy On The Matrimonial Seas*

2. See *Moulin v. Monteleone*, 165 La. 169, 115 So. 447 (1927).

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—*The Law and The Marital Interloper*, 25 Sw. L. J. 594 (1971)³ [hereinafter cited as Comment, *Piracy On The Matrimonial Seas*]. The primary common law interest protected by the action came to be the maintenance of pure bloodlines for inheritance purposes. With the rise of Christianity, moral reasons for discouraging adultery were superimposed, the custom of acquiring a new wife was disregarded, and the remedy of damages, now "unliquidated," emerged in the form of the action for criminal conversation. Lippman, *supra* at 654-55; Comment, *Piracy On The Matrimonial Seas*, *supra* at 594. By Blackstone's time the action was well established.

Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. 2 W. Blackstone, Commentaries, 139.

Comment, *Piracy On The Matrimonial Seas*, *supra* at 594-95.

The only substantive defense recognized is that of consent of the plaintiff husband to the conduct complained of, whether as to alienation or criminal conversation. Prosser and Keeton, *supra* at 921. Neither the separation of the spouses at the time the adultery occurred; nor the willingness of the wife to engage in the offending conduct as evidenced by her consent or even her initiation of the activity; nor the fact that the plaintiff himself was unfaithful to his wife constitute defenses to the action. See *Bryant v. Carrier*, *supra*; *Cottle v. Johnson*, *supra*; *Scott v. Kiker*, *supra*. Thus, it has been observed that criminal conversation has all the characteristics of a strict liability tort. Recovery is assured upon

3. Early punishments were physical and public. Among the Teutonic tribes, for example, adultery was punished severely. The husband was permitted "to cut off the hair of the guilty wife, and having assembled her relations, expel[] her naked from his house, pursuing her with stripes through the village." Tacitus, *Germania*, Pt. 1, ch. 19, lines 1-4, quoted in Comment, *Piracy On The Matrimonial Seas—The Law And The Marital Interloper*, 25 Sw. L. J. 594, 594 (1971). Additionally, some tribes permitted the husband to kill the lover if he found him in the act. Lippman, *The Breakdown of Consortium*, 30 Colum. L. Rev. 651, 654-55 (1930). Later, penalties were lessened; the husband was merely permitted to emasculate the adulterer, collect a monetary penalty and receive a new wife. *Id.* at 655.

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proof of the marriage between the plaintiff and his spouse and an act of adultery occurring between the defendant and plaintiff's spouse during the marriage. See, e.g. Note, *Hunt v. Hunt: The Status of the "Heartbalm" Torts in South Dakota*, 27 S.D. L. Rev. 160, 162 (1981) [hereinafter cited Note, *Hunt v. Hunt*]; Note, *Alienation of Affections and Criminal Conversation, supra* at 324-25.

At common law, only the husband was able to recover. "The gravamen of the cause of action for criminal conversation is the defilement of plaintiff's wife by the defendant." *Chestnut v. Sutton, supra* at 257, 176 S.E. at 743. "[T]he husband has certain personal and exclusive rights with regard to the person of his wife, which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act. . . ." *Cottle v. Johnson, supra* at 428-29, 102 S.E. at 770. The action by the husband "is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband." *Tinker v. Colwell*, 193 U.S. 473, 485, 24 S.Ct. 505, 508, 48 L.Ed. 754, 759 (1904). The action was said to prevent "the defilement of the marriage bed, the blow to the family honor and the suspicion cast upon the legitimacy of the offspring." *Id.* at 484, 24 S.Ct. at 507, 48 L.Ed. at 759.

B

While the two actions are historically distinguishable, in their modern setting they are substantially alike in both their public and private functions; both actions purport to compensate for private injury judicially described as loss of "consortium" to deter marital interference and to promote marital harmony.

The common law foundation of the husband's right of action for loss of consortium is based upon the view that the wife was her husband's servant, both were considered his chattels, and an interference with the service of a servant is an actionable trespass. Lippman, *supra* at 651. The husband's exclusive right to maintain an action for either negligent or intentional interference with his right of consortium was explained by Chief Justice Clark

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in *Hipp v. Dupont*, 182 N.C. 9, 12-13, 108 S.E. 318, 319 (1921) as follows:

At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave or any other property; that is to say by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative and the wife could not maintain an action for injuries sustained by her husband.

The reason is thus frankly stated by Blackstone: "We may observe that in these relative injuries, notice is only taken of the wrong done to the *superior* of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantage accruing therefrom; while the loss of the *inferior* (the wife) by such injuries is totally unregarded. One reason for this may be this: that the *inferior* hath no kind of property in the company, care or assistance of the *superior* as the *superior* is held to have in those of the *inferior*; and therefore the *inferior* can suffer no loss or injury." 3 Blackstone's Commentaries, 143.

Thus, the nature of the husband-wife relationship, the duties imposed upon the wife, together with the fact that she was legally the inferior party in the relationship, gave the husband the same exclusive proprietary interest in his wife as he had in his servants. This property right in the husband was deemed sufficient in law to support an action for money damages when the services owed by the wife were interfered with.

Consortium was originally said to be made up of a bundle of the husband's legal rights to the services, society and sexual intercourse of his wife. Prosser and Keeton, *supra* at 916. Later, when the proprietary and service-related basis of the action for loss of consortium came into conflict with changes in the legal status of women, the concept of consortium was broadened to include a fourth element of "conjugal affection," with a somewhat lessened emphasis on the notion of the property right to "services." See Lippman, *supra* at 652-53. Prosser and Keeton, *supra* at 916.

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[T]he wrong relates to the injury which the husband sustains by the dishonor of his marriage bed; the alienation of his wife's affections; the destruction of his domestic comfort; the suspicion cast upon the legitimacy of her offspring; the loss of consortium, or the right to conjugal fellowship of his wife, to her company, cooperation and aid in every conjugal relation; the invasion and deprivation of his exclusive marital rights and privileges; his mental suffering, injured feelings, humiliation, shame and mortification, caused by the loss of her affections and the disgrace which the tortious acts of defendant have brought or heaped upon him, and which are proximately caused by said wrong. (Citations omitted.) And for these results the plaintiff is entitled to recover compensatory damages. . . . (Citations omitted.)

Powell v. Strickland, *supra* at 323-24, 79 S.E. at 876. In other words, the husband was considered to possess a proprietary interest in the body and the mind or affections of his wife. As one court aptly observed: "[t]here are two primary rights in this case; one is the right of the plaintiff to the body of his wife, and the other to her mind, unpolluted." *Sullivan v. Valiquette*, 66 Colo. 170, 172, 180 P. 91, 91 (1919).

Most states, including North Carolina, acted to equalize the legal status of wives with the passage of Married Women's Property Acts in the late nineteenth and early twentieth centuries. Comment, *Alienation of Affections: Flourishing Anachronism*, 13 Wake Forest L. Rev. 585, 588 (1977). These Acts granted wives equal rights to own property and to sue in their own names to recover damages for their own personal injuries. *Id.* After the passage of this legislation, a husband in North Carolina retained the right to maintain an action for the loss of his wife's consortium. See, e.g. *Hipp v. Dupont*, *supra*; *Powell v. Strickland*, *supra*; *Johnson v. Allen*, 100 N.C. 131, 5 S.E. 666 (1888). This was so despite the fact, as several commentators noted, that given the derivation of these actions from the legal inferiority of women, following passage of the Acts, the courts might reasonably have either "deprived the husband of his existing action or allowed the wife a similar action." See Feinsinger, *supra* at 990; Lippman, *supra* at 662; Note, *Alienation of Affections and Criminal Conversation*, *supra* at 329.

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The majority of courts, including our Supreme Court, chose to extend the existing rights of action to the wife on the theory of her equal interest in the marriage relation, but did so without altering the underlying structure of the actions. See, e.g. *Knighten v. McClain*, 227 N.C. 682, 44 S.E. 2d 79 (1947); *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), *overruled on other grounds*, *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980); *Hipp v. Dupont*, *supra*; *Brown v. Brown*, 124 N.C. 19, 32 S.E. 320 (1899). However, as early as 1927, the Supreme Court of Louisiana in *Moulin v. Monteleone*, 165 La. 169, 115 So. 447 (1927) refused to recognize the action for alienation of affections on the ground, *inter alia*, that the right of action remained permeated with the uncultivated and obsolete ideas which marked its origin in a more primitive society where the wife was one of the husband's chattels and her companionship, services and affections were his property. The court observed that it was the husband's legal superiority which originally justified the husband's right of action, and concluded that under current law, neither spouse could be said to stand as superior to the other and therefore neither could maintain such an action.

It is just as true that a man can have no kind of property in the company, care or assistance of one who is, in every sense, his equal in the eyes of the law. It is not the wife's inferiority, but her want of superiority, that denies her the right of action, accorded the husband at common law, to recover damages for the alienation of the affections of the other spouse.

Id. at 176-77, 115 So. at 450.

The historical property-based foundation of the torts—loss of services and impure bloodlines for inheritance purposes—gave way to more abstract theories of the injuries to be compensated and the interests to be protected once the actions were extended to wives. The modern actions are generally sanctioned as attempts to maintain family solidarity and preserve marital harmony by deterring wrongful interference. See, e.g., Feinsinger, *supra* at 1008; Comment, *Piracy On The Matrimonial Seas*, *supra* at 613; Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?* 56 N.D. L. Rev. 239 (1980) [hereinafter cited, Note, *The Suit of Alienation of Affections*]; Comment,

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Alienation of Affections: Flourishing Anachronism, 13 Wake Forest L. Rev. at 585; Note, *Alienation of Affections and Criminal Conversation*, *supra* at 324. Loss of "conjugal affection" and violation of inherent marital rights were substituted for the service-based injuries originally discussed. See generally, Lippman, *supra* at 664; Feinsinger, *supra* at 991.

However, no structural adjustments were made in the elements of proof and defense in conformity with the equalized legal status of the parties to a marriage. In essence, the legal fiction of the husband's property right in the body and mind of his wife was not destroyed, but was given a new life. This is demonstrated by the fact that the consent or willingness of the participating spouse to either engage in extramarital sexual intercourse or to voluntarily transfer his or her affections to the defendant has not been recognized as constituting a defense to either action. The traditional disallowance of the defense of consent was rooted in the inferior legal status of the wife; as a legal inferior, she could not consent to the injury of her superior, her husband. See *Hipp v. Dupont*, *supra*. The failure to recognize consent as a defense discloses the fundamentally untouched property basis of liability; each spouse merely becomes the "chattel" of the other in the context of the modern actions. Thus, the untransformed torts were structurally ill-suited to actually promote marital harmony and protect the inherent marital rights of conjugal affection and fidelity. Common sense dictates that by definition, these are "rights" which can only be voluntarily given to one spouse by the other. Barring changes in the structural elements of liability and defense in conformity with the equalization of the spouses' legal status and the changing role of marriage in modern society, the actions quickly became removed from the realm of social reality.

For example, the marital couple's own failure to create or promote the marital harmony purportedly destroyed by the "predatory" third party will not bar a valid cause of action. In *Heist v. Heist*, *supra*, the defendant's conduct was found to be the controlling and effective cause of the separation of the plaintiff and her husband despite evidence tending to show that the plaintiff "may have been rather argumentative, overbearing and domineering of conversation while her husband was a quiet, patient mild mannered man, for thirty years," and "that plaintiff's husband expressed his preference for the defendant because her

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voice was 'soft.'" 46 N.C. App. at 524-25, 265 S.E. 2d at 437. In *Scott v. Kiker, supra*, the plaintiff's own infidelity to his wife was not held to bar his recovery for either alienation of affections or criminal conversation.

Similarly, in *Sebastian v. Kluttz, supra*, the plaintiff wife was able to establish the elements of a previously "happy marriage," the existence of at least "some love and affection," and a causal connection between the defendant's conduct and the loss of that affection despite evidence indicating that plaintiff's husband had previously been unfaithful, the plaintiff and her husband had separated a number of times during their marriage, and the "tranquility" of the home had been impaired by drinking and other conduct of plaintiff's husband. Furthermore, the evidence indicated that the plaintiff's husband had undertaken to visit the defendant at her own home. This Court held that "[t]he consent, and apparent willingness, on the part of the plaintiff's husband to be seduced cannot be claimed as a defense by defendant." 6 N.C. App. at 208-209, 170 S.E. 2d at 107-108. As one writer has observed, "The idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited to an era that regarded one spouse as the property of another. . . ." Prosser and Keeton, *supra* at 917.

C

Over the last fifty years the two tort actions have come under considerable attack from the public, commentators, and the courts and nearly half the state legislatures have abolished them. It has been widely recognized that the modern actions are based upon "psychological assumptions that are contrary to fact." H. Clark, *Law of Domestic Relations*, § 10.2, p. 267 (1968); see also Note, *The Suit of Alienation of Affections, supra* at 239-40; Comment, *Piracy On The Matrimonial Seas, supra* at 613. The problem has been summarized as follows:

[T]he action for alienation of affections, and to a considerable extent the action for criminal conversation proceed on the hypothesis of a perfectly harmonious husband-wife relationship destroyed or impaired by a malicious, scheming and seductive intruder. Even if this hypothesis were correct, the effectiveness of the damage remedy as a preventative may seriously be doubted, as the courts themselves have conceded

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in denying the remedy of injunction. But the hypothesis is far from conforming to the life pattern, as indicated by the facts of the cases and even by judicial opinions. As a rule, defendant becomes enmeshed with plaintiff's spouse without preconceived design. Where there is such design, juries can scarcely be expected to proceed on any objective basis to distinguish the pursuer from the pursued. Frequently the marital relationship has previously been openly disrupted, and it is safe to assume that in most cases internal disintegration has already commenced when defendant appears on the scene. An expert social scientist would scarcely undertake to designate any one cause of disorganization as "controlling" in a given case, yet the law confidently relies on the jury to make such a selection. Furthermore, the law finds no incongruity in awarding pecuniary compensation for the invasion of a relationship to which plaintiff by his previous or subsequent conduct has shown himself indifferent. Pecuniary loss is insignificant in comparison with injury to feelings in the element of compensation, and the award of indemnity is small in comparison with the assessment of exemplary damages. With these rules and consequences in view, an innocent defendant is easily induced to agree to a settlement through the threat of an action by a designing spouse or by both spouses acting in concert. On the whole, the action seems ill suited to remedy a private or public wrong, and strongly conducive to extortion, blackmail and public scandal.

Feinsinger, *supra* at 995-96.

It is generally agreed that the application of tort theory to the loss of conjugal affection cannot accurately reflect the mechanics of the usual marriage breakup because the tort concept of causation is far too simplistic.

Since any definitive assessment of cause in such cases would require a full exploration of the marital history and the parties' deepest motives, the courts must be content with a rough and ready judgment as to whether the defendant was sufficiently instrumental in bringing about the marital breakup to justify holding him responsible. Even this common sense approach is not realistic, since a marriage is not broken up by outsiders if it is solidly based on the affections of the

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parties. Causes in such a case are both numerous and obscure. Yet the courts can hardly look more deeply into it than this.

Clark, *supra* at 266. See also, Comment, *Piracy On The Matrimonial Seas*, *supra* at 613 (various psychologists have conceded the difficulty of determining cause of divorce; third party in the romantic triangle is not considered causally important in cases of extramarital sexual activity). Moreover, the underlying presumption of the perfectly harmonious spousal relationship destroyed by the "predatory intruder" itself proceeds from the obsolete and unrealistic premise that the enticed spouse has no free will or individual mind with which to resist such advances, but has allowed herself or himself to be led astray to the detriment of the existing marriage.

The first wave of opposition to the actions gathered force in the 1930's. At that time, a number of state legislatures responded by passing statutes to abolish or severely limit the action for alienation of affections or the action for criminal conversation or both. Some of the statutes abolish the actions for seduction and breach of promise to marry as well. Prosser and Keeton, *supra* at 930; Note, *Alienation of Affections and Criminal Conversation*, *supra* at 330.

The surface explanation of this [initial and] unusual legislative receptivity is a reaction against the prevalence of blackmail peculiar to these actions, the incongruity of applying the damage remedy to injured feelings, and the perversion of that remedy by courts and juries to express their emotional sympathy and moral indignation. The underlying explanation is probably a realization of the failure of these actions to accomplish their original social purposes, and their non-conformity with changed *mores* concerning sex morality, the status of women, and the functions of the family. While the importance of the affectional relations of husband and wife may still justify their legal protection, the social cost of such protection by means of an action for damages may exceed its worth.

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The justification for singling out the two actions in question from various intentional injuries to feelings, and from other intentional injuries to consortium lies in their peculiar susceptibility to the abuses in question. The characteristic which distinguishes these actions is their connotation of sexual misbehavior, by reason of which emotion and moral indignation prevail over considerations of private or public injury in the assessment of damages. For the same reason the actions attract disproportionate publicity. One result of this combination of factors is to encourage unfounded claims, and another is to induce innocent defendants to enter into extra-judicial settlements. Three legislatures have presumably weighed these results against the sacrifice of meritorious claims and have abolished the actions by large majorities.

The new legislation may also be regarded as a recognition of changed social concepts of family solidarity and functions. The recent tendency has been to relax traditional legal controls by permitting suits among members of the family and by allowing easier means of divorce. The recent statutes further relax such controls by recognizing and protecting increased freedom of association between each spouse and the outside world. From this broad point of view the current legislative movement is thoroughly commendable.

Feinsinger, *supra* at 979, 1009.

Since the 1930's, there has been a steady trend to abolish the actions. Twenty-seven states and the District of Columbia have abolished the action for alienation of affections by statute;⁴ three

4. Ala. Code § 6-5-331 (1975) (abolished for monetary damages); Ariz. Rev. Stat. Ann. § 25-341 (Supp. 1984-1985); Cal. Civ. Code § 43.5 (West 1982); Colo. Rev. Stat. § 13-20-202 (1973); Conn. Gen. Stat. Ann. § 52-572b (West Supp. 1984); Del. Code Ann. tit. 10, § 3924 (1974); D. C. Code Ann. § 16-923 (1981); Fla. Stat. Ann. § 771.01 (West 1964) (abolished for monetary damages); Ga. Code Ann. § 51-1-17 (1982); Ind. Code Ann. § 34-4-4-1 (Burns 1973 & Supp. 1982); Me. Rev. Stat. Ann. tit. 19 § 167 (1964); Md. Cts. & Jud. Proc. Code Ann. § 5-301(a) (1984); Mich. Comp. Laws Ann. § 600.2901 (West 1968); Minn. Stat. Ann. § 553.02 (West Supp. 1984); Mont. Code Ann. § 27-1-601 (1983); Nev. Rev. Stat. § 41.380 (1979); N. H. Rev. Stat. Ann. § 460.2 (1983) (abolished for monetary damages); N. J. Stat. Ann. § 2A:23-1 (West 1952) (abolished for monetary damages); N. Y. Civ. Rights Law § 80-A (McKinney 1976); Ohio Rev. Code Ann. § 2305.29 (Page 1981); Okla. Stat. Ann. tit. 76, § 8.1 (West Supp. 1983-1984) (with insignificant exceptions); Or. Rev. Stat. § 30.840

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states have imposed a one year statute of limitation to curtail the action;⁵ and one state has statutorily abolished punitive damages for alienation of affection.⁶ Twenty-one states and the District of Columbia have abolished criminal conversation by statute.⁷ Five states have shortened statutes of limitations to curtail the cause of action;⁸ and five states have statutorily limited the amount of damages or costs recoverable for criminal conversation.⁹ Interestingly, in one state the statute of limitations for criminal conversation, and other personal injuries, has been shortened to one year, although the statute of limitations for alienation of affection, and *other property injuries*, is three

(1983); Pa. Stat. Ann. tit. 48, § 170 (Purdon 1965) (with insignificant exceptions); Vt. Stat. Ann. tit. 15, § 1001 (Supp. 1984) (abolished for monetary damages); Va. Code § 8.01-220 (1984); W. Va. Code § 56-3-2A (Supp. 1984); Wis. Stat. Ann. § 768.01 (West 1981); Wyo. Stat. § 1-23-101 (1977) (abolished for monetary damages).

5. Ark. Stat. Ann. § 37-201 (Supp. 1983); Ky. Rev. Stat. § 413-140(1)(c) (1984); R. I. Gen. Laws. § 9-1-14 (Supp. 1984).

6. Ill. Ann. Stat. ch. 40 §§ 901-907 (Smith-Hurd 1980) (limited to actual damages).

7. Ala. Code § 6-5-331 (1975) (abolished for monetary damages); Cal. Civ. Code § 43.5 (West 1982); Colo. Rev. Stat. § 13-20-202 (1973); Conn. Gen. Stat. Ann. § 52-572f (West Supp. 1984); Del. Code Ann. tit. 10, § 3924 (1974); D. C. Code Ann. § 16-923 (1981); Fla. Stat. Ann. § 771.01 (West 1964) (abolished for monetary damages); Ga. Code Ann. § 51-1-17 (1982); Ind. Code Ann. § 34-4-4-1 (Burns 1973 & Supp. 1984); Mich. Comp. Laws Ann. § 600.2901 (West 1968); Minn. Stat. Ann. § 553.02 (West Supp. 1984); Nev. Rev. Stat. § 41.380 (1979); N. J. Stat. Ann. § 2A:23-1 (West 1952) (abolished for monetary damages); N. Y. Civ. Rights Law § 80-A (McKinney 1976); Ohio Rev. Code Ann. § 2305.29 (Page 1981); Okla. Stat. Ann. tit. 76, § 8.1 (West Supp. 1983-1984) (with insignificant exceptions); Or. Rev. Stat. § 30.850 (1983); Tex. Fam. Code Ann. § 4.05 (Supp. 1984); Vt. Stat. Ann. tit. 15, § 1001 (Supp. 1984) (abolished for monetary damages); Va. Code § 8.01-220 (1984); Wis. Stat. Ann. § 768.01 (West 1981); Wyo. Stat. § 1-23-101 (1977) (abolished for monetary damages).

8. Ark. Stat. Ann. § 37-201 (Supp. 1983) (one year); Ill. Ann. Stat. ch. 83, § 15 (Smith-Hurd 1966) (two years); Ky. Rev. Stat. § 413.140(1)(c) (1984) (one year); Mo. Ann. Stat. § 516.140 (Vernon 1952 & Supp. 1984) (two years); Tenn. Code Ann. § 28-3-104 (1980) (one year).

9. Ill. Ann. Stat. ch. 40 §§ 1951-57 (Smith-Hurd 1980) (limited to actual damages); Ky. Rev. Stat. § 413.140(1)(c) (1984) (limited damages); Miss. Code Ann. § 11-7-113 (1972 & Supp. 1983) (offers of satisfaction by defendant disallowed); S. C. Code Ann. § 15-37-50 (Law. Co-Op 1976) (limitation on recoverable costs); Wash. Rev. Code Ann. § 4.84.040 (1962) (limitation on recoverable costs).

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years.¹⁰ Consistent with major criticism of the two actions—that they encourage blackmail—in at least eight states it is a crime to file a complaint based on either action.¹¹ There are no such statutes in North Carolina. See 1 Lee, *supra*, § 3, p. 20.

The “heart balm” torts have been severely criticized by commentators and their abolition has been almost universally advocated. See generally, Lippman, *supra*; Feinsinger, *supra*; Clark, *supra* at 267; Note, *Alienation of Affections and Criminal Conversation, supra*; Comment, *supra*; 13 Wake Forest L. Rev. 585; Comment, *Piracy On The Matrimonial Seas, supra*; Note, *Hunt v. Hunt, supra*; Note, *The Suit of Alienation of Affections, supra*; But see Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 Notre Dame Law. 426 (1972) (author advocates preservation of action for alienation of affections, inclusion of adultery as an element of that cause of action, and abolition of the separate criminal conversation action). The reasons for abolition most commonly stated have been summarized as follows:

The reasons underlying abolition of alienation of affections are many and persuasive. One is the opportunities for blackmail which the action provides, since the mere bringing of the action can ruin the defendant’s reputation. Another is the lack of any reasonably definite standards for assessing damages and the possibility of punitive damages makes excessive verdicts likely. Still another is the peculiar light which the whole proceeding throws on the nature of marriage, leaving one with the conviction that the successful plaintiff has engaged in something which looks very much like a forced sale of his spouse’s affections. Most significantly of all, the action for alienation is based upon psychological assumptions that are contrary to fact. As has been indicated,

10. Tenn. Code Ann. §§ 28-3-104 (1980) (criminal conversation; one year statute of limitation); Tenn. Code Ann. §§ 28-3-105 (1980) (alienation of affection; three year statute of limitations).

11. Fla. Stat. Ann. § 771.01 (West 1964); Ind. Code Ann. § 34-4-4-1 (Burns 1973 & Supp. 1984); Md. Cts. & Jud. Proc. Code Ann. § 5-301 (1980); Mont. Code Ann. § 27-1-601 (1983); N. J. Stat. Ann. § 2A:23-1 (West 1952); N. Y. Civ. Rights Law § 80-A (McKinney 1976); Wis. Stat. Ann. § 768.01 (West Supp. 1981); Wyo. Stat. § 1-23-101 (1977).

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viable, contented marriages are not broken up by the vile seducer of the Nineteenth Century melodrama, though this is what the suit for alienation assumes. In fact the break-up is the product of many influences. It is therefore misleading and futile to suppose that the threat of a damage suit can protect the marital relationship. For all these reasons the abolishing statutes reflect a sound public policy and ought to be enacted more widely than they are.

Clark, *supra* at 267.

D

In those states where the actions were not legislatively eliminated, defendants during the last decade began to argue that the actions were no longer justified and should be judicially abolished. The action for criminal conversation has now been abolished by judicial decision in several states. *Fadgen v. Lenkner*, 469 Pa. 272, 365 A. 2d 147 (1976); *Kline v. Ansell*, 287 Md. 585, 414 A. 2d 929 (1980) (cause of action under which only a man can sue or be sued is unconstitutional as violative of state equal rights amendment); *Hunt v. Hunt*, 309 N.W. 2d 818 (S.D. 1981) (action for criminal conversation unanimously abolished; two of the five justices would also abolish action for alienation of affections; three justices would preserve action for alienation, but concur in majority's result for lack of evidence to sustain the alienation action); *Bearbower v. Merry*, 266 N.W. 2d 128 (Iowa 1978) (action for criminal conversation abolished; action for alienation of affections *initially retained*).

The primary justification behind the judicial abolition of the tort of criminal conversation is the lack of logically valid defenses on the merits; of secondary importance to three of the four courts mentioned was the fact that the legislatures of Iowa, Pennsylvania, and South Dakota had recently decriminalized the very behavior upon which the civil action rests. See *Hunt v. Hunt*, *supra* at 822. In *Fadgen v. Lenkner*, *supra*, the Supreme Court of Pennsylvania reasoned that apart from the fact that the action for criminal conversation was by nature seriously prone to abuse, the cause of action itself was anachronistic because the antiquated common law reasoning of the wife's inferiority which lay "behind stripping a defendant of all defenses to an action in criminal con-

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versation, save the plaintiff's consent, no longer merits endorsement." *Fadgen v. Lenkner*, *supra* at 279, 365 A. 2d at 150.

. . . in today's society it is unreasonable to impose upon a defendant such harsh results without affording any real opportunity to interject logically valid defenses on the merits such as the role of the plaintiff's spouse in the adulterous relationship or the quality of the plaintiff's marriage prior to the occurrence of the acts constituting the tort.

Id. at 280-81, 365 A. 2d at 151. The court stated that although it "in no way condone[d] sexual promiscuity and continue[d] to hold the institution of marriage in the highest regard," *Id.* at 279, 365 A. 2d at 150, nevertheless it was the court's duty to act to abolish a court-made rule where the rationale justifying the old rule no longer finds support in reason and a right sense of justice to recommend it. *Id.* at 281, 365 A. 2d at 151.

In *Hunt v. Hunt*, *supra*, the South Dakota Supreme Court characterized both alienation of affections and criminal conversation as "outmoded archaic holdovers" from an era when wives were considered the chattel of their spouse rather than distinct legal entities.

Wives are not property. Neither are husbands. The love and affection of a human being who is devoted to another human being is not susceptible to theft. There are simply too many intangibles which defy the concept that love is property.

Hunt v. Hunt, *supra* at 821. The court reasoned that in particular, the tort of criminal conversation was no longer in harmony with public policy and should be judicially abolished because defenses which should logically prevent criminal conversation actions have no legal effect. In concluding, the court added that, "We . . . believe that there is a logical limitation on the intrusion by the judicial branch upon the private lives and morals of its citizens." *Id.* at 822. The majority's rationale would, of course, also support abolition of the torts of alienation of affections. *See*, Note, *The Suit of Alienation of Affections*, *supra* at 165.

In *Bearbower v. Merry*, *supra*, the Supreme Court of Iowa also abolished the tort of criminal conversation, while retaining the action for alienation of affections. Of particular concern to the

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Bearbower court was the modern tort's lack of a real and rational relation to the goals of promoting marital harmony and preventing marital failure.

A fundamental flaw in the criminal conversation remedy, as opposed to the alienation of affections remedy, is its insensitive imposition [of liability] without regard to the viability of the marriage relationship, or to the fact, in a given instance, that [the] relationship may not have been affected adversely. In short, recovery may be allowed where stability of the marriage survives unimpaired.

Bearbower v. Merry, *supra* at 135.

The dissent in *Bearbower* reasoned that both torts should be abolished; "These 'heart-balm' torts are [both] based on a false view of marriage and human nature. They denigrate marriage and debase the common law." *Id.* at 136 (McCormick, J., dissenting in part). The primary reasons cited in the dissenting opinion for abolishing the alienation action are: (1) that one spouse does not have a proprietary interest in the love of the other; (2) spousal love is not property which is subject to theft or alienation; and (3) an action for alienation of affections is not a rational means of preserving a marriage. *Id.* at 137.

Citing various authorities on the subject of marriage and the prevention or cure of marital failure,¹² the dissent stated that it failed to find any indication that the existence of the alienation action is an effective deterrent to marital breakdown or a device for protecting the family unit.

A common denominator runs through these studies. It is that a marriage is a union of individuals. They marry for motives which are frequently nonrational. . . . Despite the marriage the parties retain their individuality. During its course a constant process of interaction occurs. Success of the marriage

12. These authorities are: R. Anshen, *The Family: Its Function and Destiny* (Rev. Ed. 1959); J. Sirjamaki, *The American Family in the Twentieth Century* (1953); R. Cavan, *The American Family* (Fourth Ed. 1969); P. Landis, *Making the Most of Marriage* (Fourth Ed. 1970); P. Popenoe, *Marriage is What You Make It* (1969); C. Broderick, *A Decade of Family Research and Action* (National Council on Family Relations, 1971); W. Lederer and D. Jackson, *The Mirages of Marriage* (1968). 266 N.W. 2d at 137-138.

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depends on the ability and willingness of each spouse to make the constant adjustments necessary because of the individuality of the other. . . .

The disintegration of a marriage is ordinarily as complex a process as is its integration. It seldom occurs overnight. It starts from within. It is not caused by only one factor or through some imperfection of only one of the spouses. Any third person who kicks at the cornerstone of a shaky marriage will not bring it down without active support from one or both of the parties. It is simplistic and unrealistic to suppose the edifice will be held together either so long as or because spouses have the right to obtain vengeance in the form of damage suits against the third person. Although a recovery of damages will punish the third person and sooth the ego while enriching the purse of the plaintiff, it is hardly calculated to be a constructive influence in maintaining or restoring a mature and stable marriage between two individuals with free will and separate identity.

Id. at 138. The dissent observed further that both the fault divorce system and the tort of alienation of affections and criminal conversation provided a "mechanism for playing out [the] fantasy" that responsibility for a marriage's failure lay with "someone else." Moreover, the torts brought out the worst in human nature, were destructive of the goal they purported to foster and denigrated human dignity by reducing marital values to monetary terms.

They provide a forum for vindictiveness and posturing self-justification. . . .

. . .

Heartbalm actions arise from the same motives and serve no nobler purpose than the stoning of the adulteress condemned in the New Testament or the affixing of the scarlet letter decried by Hawthorne, and they have no more to do with protecting marriage and the family than either of those events.

Id. at 138.

Three years later the same court acted to abolish the tort of alienation of affections in *Fundermann v. Mickelson*, 304 N.W. 2d 790 (Iowa 1981). The *Fundermann* court rejected the argument

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that abrogation of a common law right should come from the legislature rather than from the courts, that the doctrine of *stare decisis* would be impugned by abolition so soon after its decision in *Bearbower*. The court reasoned that apart from problems of proof and excessive jury verdicts, the *theory* of recovery in an alienation action was *itself flawed*. The court stated:

The right to recover for loss of consortium is a factor in assessing damages when underlying liability has been established in a personal injury suit. Renunciation of the right to recover for alienation proceeds from the belief there is no basis for the underlying liability.

In the last analysis we think the action should be abolished because spousal love is not property which is subject to theft . . . the plaintiffs in such suits do not deserve to recover for the loss of or injury to "property" which they do not, and cannot own.

Id. at 794.

The other state in which the action for alienation of affections has been eliminated is Washington. Initially, the action was abolished by the Washington Court of Appeals in *Wyman v. Wallace*, 15 Wash. App. 395, 549 P. 2d 71 (1976), *reversed*, 91 Wash. 2d 317, 588 P. 2d 1133 (1979), *vacated and affirmed*, 94 Wash. 2d 99, 615 P. 2d 452 (1980). The Court of Appeals, basing its decision upon a combination of judicially noticed facts concerning the marital relationship and scholarly works on the subject of alienation of affections, concluded that because there was so little possible social utility in the action, when balanced against the social and individual harm that it can cause, its existence could not be justified in contemporary society. *Id.* at 399-400, 549 P. 2d 73-74. The Washington Supreme Court in *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P. 2d 452 (1980), ultimately affirmed the Court of Appeals decision and abolished the action. The Court agreed that the five major reasons given by the lower appellate court were valid and called for the abolition of the alienation action. These reasons are as follows:

- (1) The underlying assumption of preserving marital harmony is erroneous;
- (2) The judicial process is not sufficiently capable of policing the often vicious out-of-court settlements;
- (3)

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The opportunity for blackmail is great since the mere bringing of an action could ruin a defendant's reputation; (4) There are no helpful standards for assessing damages; and (5) The successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse's affections.

Id. at 105, 615 P. 2d at 455.

The question of whether to retain or eliminate the tort of alienation of affections was most recently addressed by the Supreme Court of Utah in *Nelson v. Jacobsen*, 669 P. 2d 1207 (Utah 1983). A majority of the justices in *Nelson* declined to eliminate the action altogether, choosing instead to make the requirements for recovery more stringent. The majority conceded that the suit for alienation of affections does not serve to preserve or protect a marriage from interference, *Id.* at 1216, and conceded the difficulty of proving causation in such actions, *Id.* at 1218, but found none of the policy arguments advanced by the defendant,¹³ considered either separately or together, to warrant complete abolition of the tort.

The well-documented dissenting opinion forcefully argued that the action for alienation of affections should be abolished because there is no longer any legal basis for its retention. *Id.* at 1222, 1223 (Durham, J., concurring in the result and dissenting).

[T]his is an action without legal content, signifying nothing but the desire to wring money and revenge from the pain of a failed relationship. The old common law cause of action had real content in the days when the husband had a legally recognized right to his wife's services. Although we now find the concept repugnant, in the past those legal rights accurately reflected the order and consensus of society regarding the status of married persons. In that society, it was logical that a court could find a third party responsible for damage to the husband's marital rights because the wife had no legally recognized existence apart from her husband, and

13. The six policy arguments advanced by the defendant are essentially the same reasons given by the Washington Supreme Court in *Wyman v. Wallace*, *supra*, as warranting abolition. In addition, the defendant in *Nelson* argued that the tort remedy infringes upon the right to privacy. *Nelson v. Jacobsen*, 669 P. 2d 1207, 1217 (Utah 1983).

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was generally considered more passive and persuadable by nature. Those days and those rights have passed and this cause of action should be gone with them.

Id. at 1227-28. The dissent pointed out that in modern society, as contrasted with feudal society, it is widely accepted that the purpose of marriage is not pecuniary. Rather, it serves as a means by which men and women seek personal fulfillment and happiness. *Id.* at 1228. Significantly, the dissent noted that despite the fact that the state may mandate laws regulating the parties and the procedure for entering into a marriage, the reasons for and the manner in which a marriage may be terminated, "the statutes are silent regarding additional legal obligations of one spouse to the other. Our legislature has not been seen fit to bestow a legal right on either partner to any quantum of love, devotion, companionship or commitment from the other. . . . Possibly, our legislature recognizes that *commitment* to the married state must be generated by the individual and cannot be enforced by law." *Id.* at 1228.

Therefore, in our society, which recognizes husbands and wives as separate individuals, which recognizes that devotion and commitment are personal and perhaps moral obligations but not legal obligations, which refuses to recognize a cause of action by one spouse against the other for failure to love, there is no ground in law or logic for recognizing a cause of action by one spouse against a third party to whom the other spouse has voluntarily transferred his affections.

Id. at 1229.

The supreme courts of five states, while retaining the actions on the ground that abolition is a consideration best left to the legislature, view the actions with some disfavor. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E. 2d 690 (1980) (alienation actions are disfavored); *Gorder v. Sims*, 306 Minn. 275, 237 N.W. 2d 67 (1975) (absent legislative declaration, no urgency in abolishing alienation action); *Dube v. Rochette*, 110 N.H. 129, 262 A. 2d 288 (1970) (alienation action susceptible to abuse, but legislative determination to retain the action must be respected); *Kremer v. Black*, 201 Neb. 467, 268 N.W. 2d 582 (1978) (criminal conversation retained); *Felsenthal v. McMillan*, 493 S.W. 2d 729 (Tex. 1973) (court declined to abolish criminal conversation

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as it was part of the common law adopted by the Texas legislature). See also *Thompson v. Chapman*, 93 N.M. 356, 600 P. 2d 302, cert. denied, 92 N.M. 675, 593 P. 2d 1078 (N.M. Ct. App. 1979) (alienation action would be abolished if the court had authority to do so). The legislative response to *Gorder* in Minnesota and to *Felsenthal* in Texas was abolition of both heart balm actions in the former, and abolition of the action for criminal conversation in the latter. See Minn. Stat. Ann. § 553.02 (West Supp. 1984) and Tex. Fam. Code Ann. § 4.05 (Supp. 1984).

E

The foregoing discussion reveals a slow but unmistakable trend away from allowance of suits for both alienation of affections and criminal conversation. Unarguably, the integrity of the marriage relation and the preservation of marital harmony are interests deserving of judicial protection. Yet, we find general agreement among the authorities who have examined the issue that, on balance, the social harm engendered by the existence of these torts and the actual counterproductive effect of the actions on a marriage outweigh the meritorious goals purportedly served by the actions. We find the reasons advanced by the majority of judicial authorities, commentators, and state legislatures for the abolition of these actions to be well-founded and convincing. Taken together, they point unerringly to the conclusion that these torts must also be abolished in this jurisdiction.

Certainly, situations exist where a genuine wrong has been committed and the plaintiff spouse has suffered injuries which are bona fide and severe. However, in determining whether the actions further equity for individuals, equity to the plaintiff is not the only consideration. The adverse results caused to defendants and third parties must also be taken into account. The peculiar susceptibility of these actions to abuse and the disproportionate publicity occasioned by the connotation of sexual misbehavior pose significant inequities to defendants and other family members. The potential damage to reputations, and the threat to sue can easily become, in effect, schemes of extortion and blackmail. These abuses are likely to be especially prevalent in divorce settlements where the threat of suit may serve as a powerful leverage for the potential plaintiff in obtaining a disproportionate share of the marital property. The threat of public scandal that

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can be engendered by the filing of these causes of action was a major consideration behind the initial legislative movement to abolish the actions and there is no reason to believe the problem is any less prevalent today.

Furthermore, granting that the marriage relation is deserving of society's protection, the efficacy of the actions as a "preservative" has never been documented. Rather, the very institution of the lawsuit would seem likely to destroy any remaining marital harmony through the notoriety of marital failure and the stresses of litigation. Just as the availability of the actions is unlikely to actually preserve marital harmony, it is also unlikely to deter potential defendants from becoming romantically or sexually involved with married persons. Undoubtedly, as has been observed, in the usual case the conduct occurs without preconceived design, rendering the deterrent effect improbable.

Apart from considerations of utility, we are persuaded that the very theory of recovery underlying both actions is without basis in contemporary society. The above actions have never fully shaken free from their property-based origins, as evidenced by fact that the consent of the participating spouse to the offending conduct, or even his or her initiation of it, will not bar the suit. Yet, unarguably, spousal love and all its incidents do not constitute property that is subject to "theft" or "alienation."

It must be emphasized that we in no manner condone extramarital relationships or sexual promiscuity. However, we fully agree with the prevailing judicial view that because neither the statutory nor the common law imposes any obligation on married persons to maintain love or affection for each other, there is no ground in law or logic for recognizing a cause of action by one spouse against a third party to whom the other spouse has either voluntarily transferred his or her affections, or with whom he or she has chosen to engage in consensual sexual relations.

Our Supreme Court employed similar reasoning to deny a cause of action to some children against a third party for damages for alienation of their mother's affections in *Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949). The court stated that the issue before it was whether children, acting through their father as next friend, may maintain an action against a third party for damages for wrongfully disrupting the family circle and thereby

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depriving them of the affection, companionship, guidance and care of their parents. In answering the question in the negative, the Court noted that with few exceptions, the common law provided no remedy for the loss of familial benefits in recognition of the fact that the "mutual advantages, privileges, and responsibilities of members of the family circle were deemed social rather than legal." *Id.* at 174, 56 S.E. 2d at 433.

The Court distinguished the husband's common law rights of action for criminal conversation with, and the alienation of the affections of, his wife as those actions were "grounded on the common law conception of the husband's property right in the person of his wife." *Id.* at 174, 56 S.E. 2d at 433. Finding no corresponding source of legal rights for the children in the affection and care of their mother, the Court declined to recognize the children's right to maintain such actions.

The demurrer admits that plaintiffs have been deprived of the companionship, guidance, love and affection of their mother. This was brought about by the act of the mother in withdrawing these incidents of family life from them. In so doing she committed no legal wrong for which redress may be had in a court of law.

A child may expect its mother to make these contributions to the home and confidently anticipate that she will ever maintain and preserve her chastity. . . . These are matters within her keeping. The measure of their contribution is controlled by her willingness and capacity.

Since the mother, who is a free agent, committed no legal wrong for which redress may be had in a court of law, it cannot be said that the defendant, who allegedly induced her to be remiss in her domestic duties, incurred any greater liability than the law attaches to her act.

To hold otherwise would mean that every time a person persuades or induces a mother to engage in other activities to such an extent as to cause her to neglect her children, he commits a tort for which he may be compelled to respond in damages. . . . (Emphasis added.)

Id. at 175, 56 S.E. 2d at 433-34. In concluding, the Court stated that, "It is not for the courts to convert the home into a commer-

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cial enterprise in which each member of the group has a right to seek legal redress for the loss of its benefits." *Id.* at 176, 565 S.E. 2d at 434. *See also* 3 Lee, N. C. Family Law, § 244, p. 256 (1981).

Surely the mother or wife can be considered no less of a "free agent" with regard to her capacity or willingness to contribute conjugal love and affection to her relationship with her husband, and vice-versa. Although adultery remains a criminal offense in North Carolina, G.S. 14-184, we find no compelling reason to retain, in addition, a remedy of money damages for the same conduct. No longer do the courts of this State subscribe to the concept that one spouse possesses *property rights* to either "the body" or the "mind, unpolluted," of his or her spouse. *See Sullivan v. Valiquette, supra*. We find that today the concept that one person possesses legally cognizable rights to the feelings or mental attitude of another is inherently offensive. There remains, therefore, no better reason for the courts to convert the home into a commercial enterprise in the context of interpersonal spousal relations than in the context of parent-child relations.

Moreover, continued recognition of these torts is incompatible with the modern conception of the marital couple "not [as] an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed. 2d 349, 362 (1972). "[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 1682, 14 L.Ed. 2d 510, 516 (1965). Within the concept of marriage as a consensual association of autonomous individuals, a voluntary "bilateral loyalty," there is no longer any room for liability premised upon the lack of free will on the part of the spouse seeking emotional or intellectual fulfillment outside the marriage. Nor is there room for the provision of compensatory and punitive damages for the voluntary withdrawal of the benefits of love, affection and companionship from the marriage by one spouse. The detrimental effect of these actions on the privacy and autonomy interests of married persons, coupled with the many deleterious social effects of these actions as noted in Part II, C and D of this opinion, simply outweighs any possible gains in the

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direction of marital harmony to be derived from retention of the actions.

We find no inconsistency with this conclusion and the rule in this jurisdiction that a spouse may maintain a cause of action for loss of consortium due to the negligent actions of a third party so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her own personal injuries. See *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980). In such an action the underlying liability is established in the personal injury action; loss of consortium represents only an element of the damages recoverable. There, the real basis of recovery is the injured spouse's diminished or destroyed ability and physical capacity to render the marital rights of consortium, "society, companionship, comfort and affection," including sexual relations, 300 N.C. at 297, 266 S.E. 2d at 819, to the plaintiff spouse. See *Hinnant v. Power Co.*, *supra* at 124, 126 S.E. at 310. This diminished or destroyed *capacity* to render the mutual rights of consortium stands in sharp distinction with the changed disposition of the mind of one spouse towards the other, and the consequent diminished or destroyed *will-
ingness* to perform the conjugal duties encompassed by the concept of consortium in the context of the alienation of affections or criminal conversation actions.

F

We act with regard to the "heart balm" torts fully cognizant of the need for caution with regard to rules affecting marriage, home and family relationships. However, we also act with regard to our duty to the common law tradition.

It is not only the right, but the duty of the courts to re-examine questions when justice demands it, and to depart from or modify old rules when necessary to bring the law in accord with present-day standards of wisdom and justice [and] to adapt their practice and course of proceeding as far as possible to the existing state of society. . . .

1 Am. Jur. 2d, Actions, § 49, p. 582. A common phenomenon in the development of the common law is the substitution of new reasons for the maintenance of a well-established rule long after the conditions which gave rise to it have disappeared, and ex-

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perience suggests the need for change. See Holmes, *The Common Law*, p. 5 (1881). See also *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed. 2d 186 (1980).

This was recognized in [*Funk v. United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933)] where the Court "decline[d] to enforce . . . ancient rule[s] of the common law under conditions as they now exists." . . . For, as Mr. Justice Black admonished in another setting, "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it." . . . (Citations omitted.)

Id. at 48, 100 S.Ct. at 911, 63 L.Ed. 2d at 193. We agree with the Supreme Court of Pennsylvania in *Fagden v. Lenkner*, 365 A. 2d at 152, that in the case of heart balm torts, the doctrine of *stare decisis*, which advances precedent for the sake of certainty, must give way to new conditions and to the persuasion of superior reasoning.

In contrast to those courts declining to abolish the "heart balm" torts in deference to legislative action on the matter, we find ample precedent in this jurisdiction for judicial abolition of these causes of action. It is well settled that absent a legislative declaration, the courts possess the authority to alter judicially created common law rules when such action is deemed necessary in light of experience and reason. *Mims v. Mims*, 305 N.C. 41, 55, 286 S.E. 2d 779, 788 (1982) (equalization of presumption of gift in interspousal property conveyances); *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981) (common law rule rendering spouses incompetent to testify against each other in a criminal proceeding judicially altered); *Nicholson v. Hospital*, *supra* (recognition of cause of action for spouse's loss of consortium when joined with personal injury action); *Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967) (abolition of charitable immunity for public hospitals); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983) (recognition of cause of action for selling or serving alcoholic beverages to visibly intoxicated tavern patrons). It is equally well settled that in the event that an application of a common law rule cannot achieve its aim, then adherence to precedent becomes the only justification in support of the rule, and the courts are compelled to re-examine

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the common law doctrine. *Trammel v. United States, supra*; *State v. Freeman, supra* (privilege against adverse spousal testimony modified so that the witness spouse alone has privilege to refuse to testify).¹⁴

A review of the historical and theoretical bases of the actions, and the largely unsuccessful attempts to articulate a convincing modern basis for the "heart balm" torts lead us to conclude that there is no continuing legal basis for the retention of these tort actions today. They protect no interests and further no public policies not better served by other means, and the potentialities for abuse posed by their existence outweigh any possible benefits to be obtained by their retention in contemporary society. While the historical remedies allowed by these causes of action have undergone some progressive changes through the years, the actions remain permeated with the uncultivated and obsolete ideas which marked their origin. We hold that the causes of actions of alienation of affections and criminal conversation are hereby abolished in this jurisdiction.

Although we find that the trial court erroneously granted summary judgment for defendant on the ground that there was no genuine issue of fact upon either cause of action, we affirm summary judgment for defendant in view of our abolition of the two "heart balm" causes of action in this jurisdiction.

Affirmed.

Judges WELLS and BECTON concur.

14. In both *Trammel* and *Freeman*, the spousal testimonial privilege in criminal proceedings was judicially modified in recognition of two facts. First, the doctrines originally giving rise to the privilege, the common law concepts that the wife was regarded as the chattel of her husband with no separate legal identity, and the accused's disqualification from testifying on the grounds of his interest in the action, were no longer legally viable. Second, the contemporary justification for affording an accused such a privilege, the protection and promotion of marital harmony, was found to be unpersuasive and outweighed by the public interest in ascertaining the truth.

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**AKZONA, INCORPORATED v. AMERICAN CREDIT INDEMNITY COMPANY
OF NEW YORK AND FIRST STATE INSURANCE COMPANY**

No. 8328SC1325

(Filed 4 December 1984)

1. Insurance § 6.2— credit insurance—ambiguous endorsement—interpreted against insurer

Where a credit insurance policy was 26 pages long, including 14 pages constituting 11 change endorsements, some of which were consistent with and supplemental to the primary policy and some of which replaced sections of the primary policy expressly or by implication, a compulsory filing endorsement which did not expressly provide that it was intended to substitute for a portion of the primary policy was ambiguous and therefore properly interpreted against the insurer.

2. Insurance § 8— credit insurance—waiver—statement by insurer that no claim filing necessary

A credit insurer waived a compulsory filing endorsement which required notice before an account became more than three months overdue when it responded to an inquiry from plaintiff's subsidiary about whether bankruptcy filings by two of the covered debtor's guarantors constituted insolvency under the policy by stating that no claim filing was necessary at that time.

3. Rules of Civil Procedure § 60.2— denial of motion to vacate partial summary judgment on new evidence—no abuse of discretion

There was no abuse of discretion in the denial of plaintiff's Rule 60(b) motion to vacate partial summary judgment for new evidence because the new evidence was merely cumulative, and there was no showing that it could not have been discovered by due diligence in time to present it at the original hearing.

4. Rules of Civil Procedure § 60.2— Rule 60 motion for relief "for any other reason"—more properly for new evidence—considered as new evidence

G.S. 1A-1, Rule 60(b)(6) grants relief from a judgment "for any other reason," i.e., any reason other than those contained in Rule 60(b)(1)-(5), and a motion properly within the scope of Rule 60(b)(2) will be considered under that rule even though designated as under Rule 60(b)(6).

5. Insurance § 6.1— credit insurance—meaning of gross loss

In an action on a credit insurance policy, the trial court properly interpreted "gross loss covered, filed and proved" as meaning the debtor's entire indebtedness during the policy period, rather than the portion of the indebtedness protected by the policy, which could never exceed the policy amount.

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6. Pleadings § 37.1; Appeal and Error §§ 11, 24— argument on appeal precluded by answer, admissions, and unexcepted finding

An excess insurer which contended that the insured had not satisfied the condition that it maintain \$300,000 of primary coverage because the \$300,000 primary policy carried a \$50,000 deductible was precluded from taking that position on appeal because it had admitted in its answer that the primary policy had limits in the amount of \$300,000; had signed stipulations stating that the coverage was \$300,000; did not except to a finding of fact in the final judgment that the primary coverage was \$300,000; alleged in its answer that its indebtedness would have been limited if timely notice had been filed, thus admitting indebtedness; and had participated in a "package deal" sold to plaintiff in which the primary and excess insurers were familiar with each other and familiar with the nature and content of their insurance policies. Even if the excess insurer had not waived its argument on appeal, the terms of the primary policy complied with the excess insurance requirement.

7. Appeal and Error §§ 2, 11— credit insurance—argument on appeal—prohibited by failure to move to dismiss and by stipulation

Where an excess insurance policy contained a provision that no claim would be allowed until the claim was determined to be legally valid and admitted by the primary insurer, the excess insurer may not argue that the insured cannot bring an action against it or that interest against it may not run until a final mandate from the Appellate Division is issued because the excess insurer never made a motion to dismiss and signed a stipulation that it had been properly served and joined. Furthermore, there is no authority requiring a final appellate judgment before interest is assessed against a party. G.S. 24-5, G.S. 1A-1, Rule 20.

APPEAL by defendants from *Howell, Judge*. Judgment entered 22 June 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 23 October 1984.

This is an action by Akzona, Incorporated ("Akzona") against American Credit Indemnity Company of New York ("ACI") and First State Insurance Company ("First State") to recover under policies of credit insurance issued to cover the account of Victoria Fabrics Corporation ("Victoria") with Akzona's subsidiary, American Enka Company ("Enka").

Akzona alleged in its complaint that as a result of Victoria's insolvency, it sustained losses of over \$546,000 due to it from Victoria. It alleged that ACI is liable to it for the full amount of the primary policy, \$300,000, plus interest and costs, and that as excess insurer, First State is liable for the remainder of plaintiff's losses in an amount not exceeding \$300,000, the excess coverage, again plus interest and costs. ACI has acknowledged approximate-

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ly \$46,000 worth of liability, but denies further liability under its policy, alleging that Enka failed to comply with a compulsory filing endorsement in its policy.

In support of its contention that it has no liability whatsoever, First State adopts ACI's arguments, and also argues separately that plaintiff failed to maintain \$300,000 worth of primary coverage as required by First State's excess insurance policy.

Upon motions of all parties, an order for partial summary judgment was entered, construing the compulsory filing endorsement in plaintiff's favor. The trial court ruled that failure to comply with the endorsement did not provide for a forfeiture of policy coverage. Based upon subsequent discovery, defendants filed a motion under Rule 60(b)(6) to vacate the order. This motion was denied.

The case was tried, and the final judgment directed that ACI pay plaintiff \$250,000 plus interest running from 5 November 1980 (two months from the date of plaintiff's claim under the policy), and that First State pay \$246,369.46 with interest to run from the date of judgment. Defendants ACI and First State appeal.

Redmond, Stevens, Loftin and Currie, by John S. Stevens and Thomas R. West, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon, for defendant-appellant American Credit Indemnity Company.

Bennett, Kelly and Cagle, P.A., by E. Glenn Kelly, for defendant-appellant First State Insurance Company.

VAUGHN, Chief Judge.

I

[1] The central issue on this appeal involves the construction of the compulsory filing endorsement to the ACI policy. Plaintiff, ACI, and First State all moved for partial summary judgment for the trial court to construe the endorsement. In his order, Judge Robert D. Lewis ruled that the compulsory filing endorsement

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does not provide for a forfeiture of coverage for an otherwise covered account because of an insured's failure to file its claim in accordance with the filing provisions of the endorsement, but rather that the insured's failure to comply with the compulsory filing provisions affects claim settlement of all amounts received by the insured from First State. According to the trial court, then, the sole effect of noncompliance with the endorsement is to reinstate the provision for the deduction in any claim settlement of amounts received by Akzona from First State. Both ACI and First State argue that Judge Lewis erred in his ruling, contending that the language of the endorsement was susceptible to a single interpretation, namely, that Akzona was obligated thereunder to file its claim on the Victoria account before the account was three months past due, and the consequence of its failure to comply with the filing provisions was the forfeiture of coverage for that portion of Victoria's indebtedness not timely filed.

The change endorsement to the ACI policy, entitled "Compulsory Filing Endorsement," provides in pertinent part that

if the Insured [Aktiona] shall obtain an Insurance Policy from the First State Insurance Company which provides excess coverage on shipments made . . . to . . . Victorian [sic] Fabrics Corp. . . . then in such event, the Company [ACI] waives the provisions for the deduction in any Claim Settlement of all amounts received by the Insured from the First State Insurance Company, . . . subject to the following provisions: (a) The Insured, during the Insolvency period of this policy, must file a Notification of Claim and place the account of any debtor specified above with the Company for collection after said account shall have become due and payable under the original terms of sale but before it shall have become more than 3 months past due under the original terms of sale. . . . Failure of the Insured to comply with these provisions shall void the coverage on any indebtedness of the debtor or part thereof which is not filed with the Company for collection as provided by this paragraph.

The section of the primary policy entitled "Claim Settlement" enumerates certain deductions to be made from the gross loss sustained by the insured in order to arrive at a net loss figure. These deductions encompass "all amounts collected from the

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debtor or obtained from any other source," which, absent waiver thereof, include amounts obtained from First State, the excess insurer. There is also a section in the primary policy entitled "Optional Filing of Past Due Accounts," which permits, but does not require, the insured to file with ACI for collection an account against a noninsolvent debtor before the account has become more than three months past due. The compulsory filing endorsement ends with the words, "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms or conditions of said Policy, other than as above stated."

We start our analysis with the basic principle of insurance law that policies are to be given a reasonable interpretation. *Trust Co. v. Insurance Co.*, 6 N.C. App. 277, 170 S.E. 2d 72 (1969), *rev'd on other grounds*, 276 N.C. 348, 172 S.E. 2d 518 (1970). The policy before us is, quite frankly, a crazy quilt of a document. It is 26 pages long, 12 pages of which constitute the primary policy, 14 pages of which constitute 11 separate "change endorsements" to the policy, some of which are consistent with and therefore supplement the primary policy, and others which replace sections of the primary policy, either expressly or by implication. ACI's contention is that the compulsory filing endorsement was in part intended to substitute for that portion of the primary policy providing for optional filing of past due accounts. This is, however, less than clear from the policy itself. Nowhere in the compulsory filing endorsement does it expressly provide that "Optional Filing of Past Due Accounts" is no longer in effect. Any intention on the insurer's part to have the optional filing provision invalidated by implication through the change endorsement is further obscured by the language of the endorsement that it does not "vary, alter, waive or extend" the primary policy.

The net effect of these various policy provisions concerning claim filing of past due accounts of a non-insolvent debtor, particularly in light of the length and complexity of the policy, is the creation of ambiguity. See *Joyner v. Insurance*, 46 N.C. App. 807, 266 S.E. 2d 30, *review denied*, 301 N.C. 91 (1980) (test for ambiguity is what reasonable person in position of insured would have understood the language to mean, and not what insurer intended). See also *Blake v. Insurance Co.*, 38 N.C. App. 555, 248 S.E. 2d 388 (1978) (examine policy as whole, not piecemeal). Once it is established, as here, that policy language is ambiguous, it is only

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necessary to apply the well-recognized principle of insurance law that if there is any doubt concerning the true meaning of a policy clause, the doubt is to be resolved against the insurer, who authored it. *E.g., Hallock v. Casualty Co.*, 207 N.C. 195, 176 S.E. 241 (1934). *Accord, Machinery Co. v. Insurance Co.*, 13 N.C. App. 85, 185 S.E. 2d 308, *cert. denied*, 280 N.C. 302, 186 S.E. 2d 176 (1972) (where provisions in policy conflict, those favorable to insured control). The trial court, then, was entirely correct in resolving ambiguities in the policy against the insurer ACI, and ruling that the compulsory filing endorsement did not provide for a forfeiture but only affected claim settlement. *See Woodell v. Ins. Co.*, 214 N.C. 496, 199 S.E. 719 (1938) (court will construe separate parts of insurance contract with a view to equitable enforcement; "harsh and literal" construction of procedural requirements not favored).

[2] Furthermore, even if ACI and First State's interpretation of the compulsory filing endorsement had been the proper one, ACI waived its right to rely upon the endorsement as to the indebtedness of Victoria to ACI's insured, Akzona.

The record contains the following exchange of correspondence between the parties: On 6 June 1980, Enka's assistant treasurer sent a telegram to ACI informing it that on 2 June 1980, two of Victoria's operating subsidiaries, both of which guaranteed Victoria's debt to Akzona, filed for bankruptcy. Enka then inquired, "Does this constitute insolvency under Paragraph 3 of [the ACI primary policy]? Please advise if claim should be filed at this time." On 9 June 1980, Enka received a written reply signed by ACI's vice-president, informing Enka that:

The bankruptcy petition of the guarantors does not constitute an insolvency of the debtor as defined under Condition No. 3 of the policy. In view of this, you are not required to file a claim against the debtor at this time under the provisions of Condition No. 3 of your policy.

At ACI's request, receipt of this letter by plaintiff was acknowledged by the signature thereon of Enka's assistant treasurer. Enka did not file a claim at that time. Victoria went bankrupt on 26 August 1980, and Akzona filed its notification of claim pursuant to Condition No. 4 of the policy on 5 September

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1980. We believe these facts establish a waiver of the conditions of the filing endorsement.

Waiver in insurance law is the intentional relinquishment of a known right. *Moore v. Prudential Insurance Company of America*, 166 F. Supp. 215 (M.D.N.C. 1958). An insurer may waive a provision of condition in an insurance policy which is for its own benefit, *Brandon v. Insurance Co.*, 301 N.C. 366, 271 S.E. 2d 380 (1980), waiver of such a provision being predicated on knowledge on the part of the insurer of pertinent facts and conduct thereafter inconsistent with an intent to enforce the condition. *Town of Mebane v. Insurance Co.*, 28 N.C. App. 27, 220 S.E. 2d 623 (1975). Although the parties disagree as to what rights an insured has under the compulsory filing endorsement, it is undisputed by the language of the endorsement that such rights may only be preserved by the filing of a notification of claim by the insured during the insolvency period of the policy.

The insured, Enka, was uncertain whether the bankruptcy filing of two of the debtor's guarantors constituted an insolvency under the policy that would necessitate the filing of a claim. Enka promptly requested a clarification of the policy from the insurer, although without specifying the particular policy provision under which a claim might have to be filed. ACI's response stated that the policy did not require Akzona to file a claim at that time under Condition No. 3, and then added:

You must, however, be sure the proof of your claims against the guarantors in their bankruptcy proceedings are perfected in order to preserve your ability to file against the actual debtor.

This portion of the letter manifests ACI's understanding that the purpose of Akzona's inquiry was to make certain it was fully complying with the policy. ACI's letter purports to inform Akzona of what it needed to do to preserve *all* its rights under the policy, not merely those rights connected with compliance with Condition No. 3. Akzona did not file a claim in June 1980 based upon ACI's representations that no claim filing was needed at that time. Under these circumstances, ACI is estopped from asserting a defense based on the delinquency of the insured to file a claim. See *Kendrick v. Insurance Co.*, 124 N.C. 315, 32 S.E. 728 (1899) (where policy susceptible of two constructions, and insurance

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agent gave it one, and insured was misled thereby, company could not claim forfeiture because the insured did not follow the other construction).

[3, 4] We next address defendants' argument that the trial court abused its discretion in refusing to vacate the order allowing partial summary judgment under Rule 60(b) on the grounds that new evidence of the parties' course of dealing demonstrated a mutual understanding of the interpretation of the endorsement directly contradictory to that interpretation given to it by the trial court. In denying the motion to vacate, the trial court concluded that this "new" evidence was merely cumulative, and our review of the record satisfies us that the evidence was indeed cumulative. Furthermore, the evidence relied upon by defendants, contained in two depositions, was not "new evidence" as contemplated by the Rules of Civil Procedure, Rule 60(b)(2), *i.e.*, the defendants did not show that the evidence could not have been discovered by the exercise of due diligence in time to present it in the original proceeding. *Harris v. Medical Center*, 38 N.C. App. 716, 248 S.E. 2d 768 (1978). Defendants attempted to circumvent the definitional requirements for new evidence under Rule 60(b)(2) by designating their motion as one made under Rule 60(b)(6), which grants relief from a judgment or order for "any other reason justifying relief from the operation of the judgment." Defendants argue that Rule 60(b)(6) allows relief to be granted under extraordinary circumstances and where justice demands it. *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E. 2d 9 (1980). Defendants' motion, however, was expressly based on newly discovered evidence, which brings it within the scope of Rule 60(b)(2), and not within the scope of Rule 60(b)(6), which speaks of any *other* reason, *i.e.*, any reason other than those contained in Rule 60(b)(1)-(5). Thus, this motion was not properly brought under Rule 60(b)(6), and defendants' discussion of Rule 60(b)(6) is inapposite.

We note that the only question for appellate determination on a Rule 60 motion is whether the trial court abused its discretion in denying the motion. *Sawyer v. Goodman*, 63 N.C. App. 191, 303 S.E. 2d 632, *review denied*, 309 N.C. 823, 310 S.E. 2d 352 (1983). No such abuse occurred here. Defendants suggest the trial court erred in denying their motion because it stated in its order that it had "no authority" to enter a ruling on the motion to vacate the partial summary judgment, which statement was legal-

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ly incorrect. We reject defendants' argument. Judge Lewis' order states that "[b]ased on the foregoing [findings], the Court concludes that it has no authority to enter a ruling . . ." (emphasis added). These findings establish that the new evidence was cumulative, and therefore it would have been inappropriate to grant defendants' motion. Furthermore, in the last paragraph of the order Judge Lewis makes it clear that he is aware he has the authority to vacate his earlier order, *see Miller v. Miller*, 34 N.C. App. 209, 237 S.E. 2d 552 (1977), but is declining to exercise such authority here. The last paragraph reads:

Notwithstanding the fact that the evidence presented by Defendant in support of its Motion was cumulative, the Court considered said evidence and is still of the opinion that the Court's ruling as expressed in the previous partial Summary Judgment entered is correct.

[5] ACI and First State next contend that the trial court erred in its definition of "gross loss covered, filed and proved" as used in the claim settlement section of the ACI policy. The claim settlement section sets out the method by which net loss is calculated. "Gross loss covered, filed and proved" is the starting point of this calculation, that is, before any deductions are made. The insurers argue that the error in definition was prejudicial in that it increased their liability under their respective policies. We disagree with defendants, and conclude that the trial court correctly defined the phrase.

The parties stipulated that Akzona properly filed and proved a loss of \$546,349.46 arising during the time period covered by the ACI policy. Thus, the parties agree that the "gross loss filed and proved" is \$546,349.46. Their dispute on this issue involves the meaning of the word "covered." The trial court concluded, and plaintiff here contends, that gross loss covered means the entire indebtedness of Victoria to Akzona arising from sales during the policy period, as that indebtedness existed on the date of insolvency, here, \$546,349.46.

ACI's position, adopted in full by First State, is that the term gross loss covered means only that portion of the entire indebtedness of Victoria to Enka which is protected by the ACI insurance policy, prior to any deductions. According to this defini-

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tion, gross loss covered can never exceed the policy amount of \$300,000, and in this case is \$300,000.

The claim settlement portion of the policy unequivocally supports the conclusion that the "gross loss covered, filed and proved" in this case is \$546,349.46. In calculating the amount payable to the insured, certain specified deductions are made from the gross loss covered, filed and proved to arrive at a preliminary net loss figure. Only at that point is the policy coverage of \$300,000 considered: the policy deductible of \$50,000 is subtracted from the net loss figure and ACI is liable for the remainder not exceeding the policy amount, which is stated to be \$250,000. It is entirely sensible that the policy coverage of \$300,000 does not come into play until a net loss figure is established, *i.e.*, at the point where the insurer's actual dollar liability under the policy is being fixed. Furthermore, even if "gross loss covered, filed and proved" were an ambiguous term, also susceptible to the meaning urged upon us by the defendant-insurers, the trial court's definition alone harmonizes with those principles of insurance law that a policy is to be construed in favor of coverage and against the insurer who selected its language, *e.g.*, *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966), while defendants' definition is in defiance of those principles.

II

[6] In addition to the foregoing arguments made jointly by ACI and First State, First State also advances two separate defenses to liability based on its excess insurance policy. It first argues that the trial court erred in failing to dismiss plaintiff's complaint against it and in awarding plaintiff any sum from First State because Akzona failed to maintain \$300,000 of primary insurance from ACI as required by the First State policy. First State reasons that although the gross amount covered by the ACI policy is \$300,000, because that policy contains a \$50,000 deductible, plaintiff only obtained \$250,000 worth of primary insurance, and that therefore no valid contract of insurance ever existed between plaintiff and First State. The record makes it abundantly clear that First State consistently maintained at each stage of the litigation that plaintiff retained \$300,000 worth of primary in-

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surance through ACI. First State is therefore precluded from taking a contrary position on this appeal.

First, defendant First State admitted in its answer to Akzona's complaint that the ACI credit policy had policy limits in the amount of \$300,000. An admission of fact contained in a pleading is conclusively binding upon the party making it. *Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964).

Second, shortly before the summary judgment hearing, counsel for all parties signed written stipulations of fact. One of these stipulations recites that the ACI policy insured Akzona against loss due to the insolvency of Victoria "up to the policy limits of \$300,000.00 less a Primary Loss of \$50,000.00 . . ."; another stipulation states that the First State policy insures Akzona against loss in excess of the \$300,000 loss coverage provided by ACI. First State seeks here to directly controvert a fact to which it has already stipulated. This it may not do. Like an admission in a pleading, a stipulated fact is a judicial admission, having the force of a jury verdict, and binding in every sense. A party making a stipulation may not afterwards take a position inconsistent therewith. *Thomas v. Poole*, 54 N.C. App. 239, 282 S.E. 2d 515 (1981), *review denied*, 304 N.C. 733, 287 S.E. 2d 902 (1982).

Third, First State failed to except to the finding of fact in the final judgment that at all relevant times \$300,000 of primary insurance was in effect under the ACI policy, which it was required to do in order to preserve its right to raise this issue on appeal. Rule 10, N.C. Rules of App. Proc. First State also never raised its contention concerning lack of primary coverage at any point during the trial stage, and such contention therefore may not be raised for the first time on appeal. *White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983).

Fourth, we respond to the contention advanced in oral argument by First State, that the phrase "policy limit of \$300,000" used in its answer and in the stipulations has a different meaning from the phrase it uses in arguing that the policy is a nullity, i.e., "primary insurance of \$300,000." Based on its view that the two terms have different meanings, First State concludes it is not precluded from arguing here on appeal Akzona's failure to maintain adequate primary coverage. We reject First State's semantic

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distinction between the terms "policy limit" and "primary insurance."

We note that as part of its answer, First State alleges that had Akzona timely filed with ACI, First State's indebtedness to Akzona would not have exceeded \$121,000. This defense, consistent with the theory that if Akzona had timely filed with ACI, First State would have incurred some liability, is therefore tantamount to an admission that a valid policy of excess insurance existed between First State and Akzona. It is inconsistent with First State's position on appeal that a valid contract of insurance never existed between the parties.

Furthermore, the two policies were virtually sold to plaintiff as a "package deal." The record shows that ACI and First State were familiar with each other, and familiar with the nature and content of their insurance policies. Enka's former treasurer testified that ACI acted as broker for the plaintiff in procuring the excess insurance policy from First State; ACI's primary policy states that the compulsory filing endorsement is activated by the obtaining of excess coverage "from the First State Insurance Company."

Finally, even had First State not conclusively waived its right to argue on appeal that the ACI policy did not provide \$300,000 of primary coverage, its contention that the policy did not provide \$300,000 worth of coverage because it had a \$50,000 deductible is erroneous. The policy states that the gross amount covered is \$300,000, that the primary loss, *i.e.*, deductible, is \$50,000, and that the policy amount is \$250,000. This, in our opinion, complies with the condition in the First State policy requiring that plaintiff retain \$300,000 of primary insurance from ACI. First State was not liable until \$300,000 of loss, which loss was covered by the ACI policy, had been sustained by the plaintiff on the Victoria account.

[7] First State's other separately argued defense to liability is that the trial court erred in failing to dismiss plaintiff's complaint against it based on the following condition in its policy:

[N]o claim for loss shall be made nor shall any claim for loss be allowed under this Policy unless it shall have first been determined to be a valid and legally sustainable indebtedness

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admitted as a file [sic] and proven loss by the Primary Insurer under its primary policy

First State argues that Akzona cannot bring any action against it until a "final mandate" is issued by this Court or by the North Carolina Supreme Court, or alternatively, that interest shall not run on any sum Akzona might recover from First State until the date of such final mandate.

Examination of the record reveals that nowhere did First State make a motion to dismiss; rather, it reveals that First State signed a stipulation that it had been properly served and joined. Again, not only is First State precluded from arguing that this action should have been dismissed against it for the first time on appeal, *White v. Pate, supra*, it is bound by its stipulation that it had been properly joined. *Thomas v. Poole, supra*. Even if First State had not so stipulated, it was properly joined as a party defendant. Our Rules of Civil Procedure permit parties to be joined as defendants when the right to relief asserted against them arises from the same transaction or occurrence. Rule 20, N.C. Rules Civ. Proc. Clearly, any right to relief available to Akzona from both ACI and First State arises from the facts and circumstances surrounding Victoria's insolvency.

We further observe that the quoted policy provision by its terms does not require a final appellate mandate before suit may be brought by the insured against the excess insurer. Its effect on this case was properly taken into account by the trial court, which recognized that First State's liability could only be determined after ACI's liability was determined. Consequently, it concluded that First State's liability for interest runs from the date of judgment, that is, the date on which ACI's liability was proven. We have found no authority in this State requiring that a final appellate judgment be rendered before interest can be assessed against a party. See G.S. 24-5.

Affirmed.

Judges BRASWELL and EAGLES concur.

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CAROLYN T. COBLE v. RICHARDSON CORPORATION OF GREENSBORO

No. 8418DC234

(Filed 4 December 1984)

1. Sales § 6.4— warranties on sale of house—binding despite label

In an action for breach of warranty and unfair and deceptive trade practices arising from drainage problems around a newly built house, defendant was bound by a section of the contract labeled "Non-Warrantable Items" because that section clearly created obligations on defendant's part.

2. Sales § 6.4— warranties on sale of house—effect of "walk through" inspection form

Although plaintiff did not mention a water drainage problem in her newly purchased house on a "walk-through" before closing, defendant is bound by its construction warranty because the warranty does not indicate that a defect must be noted on the form for a buyer to preserve rights or that the form is the exclusive means of notifying defendant of problems arising under the warranty.

3. Evidence § 32.2— parol evidence—warranty on house—no inconsistency with contract

Oral representations regarding a water drainage problem made by defendant developer's agents prior to and at closing were properly admitted, despite a merger clause in the contract of sale and the parol evidence rule, because the statements did not "vary, add to, or contradict" the construction warranty contained in the contract.

4. Contracts § 29.2— damages—correction of drainage problem in newly built house

In an action arising from a drainage problem in a newly constructed house, there was ample competent evidence to support the trial court's finding that \$1,474.40 was the reasonable cost of correcting the problem where plaintiff testified that she had hired an independent contractor to correct the drainage problem and to do other work, and that \$1,474.40 was the portion of his total bill representing the amount she paid him to correct the problem, and where the contractor testified that the cost of repairing the problem was between \$1,500 and \$1,800 and that this was a reasonable and necessary amount. Findings of fact made by the trial court which resolved conflicts in the evidence are binding on appeal, even though the evidence also supported a different conclusion.

5. Accord and Satisfaction § 1— finding that no accord and satisfaction existed—no error

In an action arising from a drainage problem in a newly constructed house, the trial court did not err in finding that plaintiff had not entered into an accord and satisfaction where plaintiff testified that the amount tendered by defendant would not compensate her for correcting the problem, a check sent to plaintiff by defendant which contained the words "void after 60 days"

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was not cashed within the 60 days, and plaintiff's counsel sent defendant a letter explicitly rejecting any offer to settle.

6. Unfair Competition § 1— sale of house—breach of warranty—no unfair trade practice

In an action arising from a drainage problem in a newly constructed house, the trial court erred by finding that defendant's failure to correct the problem constituted an unfair trade practice. Breach of express and implied warranties alone does not constitute a violation of Chapter 75, and there was nothing so oppressive or overreaching about defendant's behavior that it would transform the case into one for an unfair trade practice.

APPEAL by defendant from *John, Judge*. Judgment entered 21 September 1983 in District Court, GUILFORD County. Heard in the Court of Appeals 14 November 1984.

Plaintiff filed this action for damages resulting from breach of warranty and unfair and deceptive trade practices in connection with the sale of a single family residence.

The case was tried by the court without a jury. The plaintiff testified as follows: Sometime before March 1978, plaintiff and her fiancé were shown the home in question, which had been built on a lot owned by defendant, a real estate development company. At that time she noticed washed-out spaces in the yard, gullies, and very little grass. She expressed concern about the yard and she was told that there was a water problem but that it would be resolved upon purchase. At the closing, plaintiff was assured by the head of defendant's residential department that the water problem would be taken care of. Plaintiff moved into the house in March 1978. The yard was in bad shape, and water was accumulating under the house. Because her fiancé had died, plaintiff did not contact defendant about correcting the drainage problem until autumn. The result of her telephone conversations was that defendant sent workers to reseed plaintiff's lawn on three separate occasions, the last of which was in November 1978. Plaintiff continued to communicate with defendant, but the problem remained unsolved. In May 1979 she contacted Calvin Bryant, an independent landscaping contractor. Bryant performed work to correct the drainage problem, and did other landscaping work as well.

Calvin Bryant testified for the plaintiff that to solve the drainage problem, he installed french drains, a terrace, lowered

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the soil in the back of the house, built a retaining wall with cross-ties, and placed some photinia plants in the yard to prevent erosion. Plaintiff testified that after Bryant completed his work, she requested \$1,474.40 from defendant, and received a check from them for \$400. She states she never cashed the check, but gave it to her attorney. Plaintiff testified that she had virtually no water drainage problems after Bryant's work, except for a water pipe which broke in the winter of 1981. Bryant testified that he visited the house several times after he worked on it, and that there was no dampness under the house.

Defendant presented the following evidence: Bill Osborne, a landscaping contractor, testified that he corrected a similar water problem at the house next door to plaintiff's for \$300. He also described another method to correct such problems which would cost about \$400.

Margaret Dudley testified that she purchased plaintiff's house in April 1981. She stated that due to a problem with water collecting in the crawl space underneath the house plaintiff left \$300 in escrow from the closing proceeds to cover the cost of rectifying the problem. She further testified that when it rains, water accumulates next to the foundation.

Two of Richardson's employees also testified for the defendant: Wayman Merrill, currently manager of defendant's construction department, and Anna Maser, a real estate broker for defendant who sold plaintiff the house. Merrill testified as follows: He accompanied plaintiff on a walk-through of the house before plaintiff purchased it. No water problem was discussed. He spoke with plaintiff in February or March of 1979 and told her that although matters related to landscaping were not covered by the warranty, he would take a look at her property after the yard dried out from winter rains. He next spoke with plaintiff in May 1979, when she told him she had contracted with Calvin Bryant. He subsequently examined the yard, concluded that \$400 constituted a fair amount to solve the drainage problem, and upon plaintiff's agreement to accept \$400 as a settlement, he had a check in that amount mailed to her. He had no further communication with plaintiff until he received a demand letter from her attorney in November 1979.

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Anna Maser testified that she originally showed plaintiff and her fiance the house, that they requested the yard be reseeded, but never mentioned the water drainage problem. She testified that no water problems were discussed at the closing, and that after the closing she wrote a memorandum to defendant's landscaping department after speaking with plaintiff. One of the items on the memorandum was that plaintiff was concerned over defendant's failure to reseed the lawn.

Judge John awarded plaintiff \$1,474.40 in compensatory damages, and based on his conclusion that defendant's actions constituted an unfair trade practice, trebled the damages. Defendant appeals.

Douglas, Ravenel, Hardy, Crikfield & Lung, by G. S. Crikfield and James W. Lung, for plaintiff-appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by M. Jay DeVaney and Thomas W. Brawner, for defendant-appellant.

VAUGHN, Chief Judge.

I

Defendant first argues that the trial court committed reversible error in concluding that defendant breached a duty to correct a drainage problem with plaintiff's house, which duty arose out of certain written and oral representations made by defendant. We overrule the assignments of error on which this argument is based.

A

[1] As to the written representations, the record contains a document entitled "Construction Warranty." This document is part of the entire, integrated contract; indeed, the defendant does not dispute that it was bound by the warranty, but rather that the trial court erred in interpreting the scope of coverage. The section titled "Non-Warrantable Items" includes the following provisions:

Waterproof Foundation—Reasonable precautions have been taken to prevent water from entering the basement or crawl space. Always remember that the best assurance for a

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dry basement or crawl space is to see that surface water drains away from the foundation. Water that settles around the foundation will most likely leak underneath. The homeowner should be sure to fill any settling that often occurs around a new foundation. Keep perimeter drain pipe open at outfall end of pipe. This is part of the owner's maintenance.

Grading—Your lot and surrounding lot grades were established to provide drainage away from the building. Should you wish to change the drainage pattern for some reason, be sure that a proper drainage slope is retained. Do not fill above the top of the foundation. Water may enter the typical joint between the foundation and brick or siding. Your builder assumes no responsibility for the grading if established patterns are altered or for water problems caused by improper drainage contrary to his recommendation.

The defendant contends that although the quoted provisions are found on its warranty form, because they appear in the section denominated "Non-Warrantable Items," no obligations on defendant's part are created. We disagree. Despite the title of the section, and despite the fact the section distinguishes particular situations in which defendant will not be liable to the buyer under the warranty, its provisions clearly create obligations on defendant's part. Listed under "Non-Warrantable Items" are the following statements: "We warrant that shrubs will be alive and in healthy condition at the time the owner moves into the house"; "Builder is responsible [for broken glass and torn screens] only if notified before or at time of 'walk through' inspection . . ."; "[W]e will resow and remulch any washed out spots [of the lawn] . . . once . . . within 12 months of the closing. . . ." It is self-evident that those statements are express warranties creating affirmative obligations. Likewise do the statements relied upon by plaintiff, i.e., "Reasonable precautions have been taken to prevent water from entering the basement or crawl space," and "Your lot and surrounding lot grades were established to provide drainage away from the building," create obligations on defendant's part.

[2] The defendant further argues that because the construction warranty contains a procedure for a "walk-through" of the house

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before closing, with defects to be noted on a request for service form, the failure of plaintiff to mention the water drainage problem on this form precluded it from subsequently raising this claim under the one-year warranty. Again, the plain language of the warranty belies defendant's argument. Nowhere in the warranty is it indicated that a defect must be noted on the request for service form during the walk-through in order for a buyer to preserve any rights, or even that the three request for service forms provided by defendant are the exclusive means of notifying the defendant of problems arising under the warranty.

The foregoing discussion disposes of defendant's suggestion that if it had any duty with respect to plaintiff's water problem, it was merely to reseed. Plaintiff timely notified defendant of a specific defect involving drainage covered by the warranty. Defendant was obligated to correct the problem. Clearly, defendant's duty was not limited to reseeding plaintiff's lawn if that failed to solve the problem.

B

[3] The trial court also based its conclusion that defendant breached its duty to plaintiff to correct the water problem on oral representations made by defendant's agents prior to and at the closing. Defendant argues that the oral representations were improperly admitted into evidence, relying on the parol evidence rule and on a merger clause in the contract of sale.

Defendant has waived its right to assert the parol evidence rule, as the record reveals that defendant failed to object to the testimony at trial. *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 197, 225 S.E. 2d 557, 564-5 (1976) (admitting evidence of statements made prior to signing of purchase contract). Even if the testimony had been properly objected to, however, neither the parol evidence rule nor the merger clause operates to exclude the oral representations.

The parol evidence rule provides that when a contract is reduced to writing, parol evidence cannot be admitted to vary, add to, or contradict the same. *Hoots v. Calaway*, 282 N.C. 477, 486, 193 S.E. 2d 709, 715 (1973). The contract of sale between the parties contained the following provision, commonly referred to as a merger clause.

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Buyer hereby acknowledges that he has inspected the above described property, that no representations or inducements have been made other than those expressed herein, and that this contract contains the entire agreement between all parties herein.

This is not a case where a party relies on a merger clause in one document to exclude another from admission into evidence. See *Loving Co. v. Latham*, 20 N.C. App. 318, 201 S.E. 2d 516 (1974). Instead, what defendant asserts is that the oral representations plaintiff claims were made to her concerning the water problem are inconsistent with the written agreement and hence inadmissible. As discussed *supra*, however, the construction warranty did obligate the defendant to correct the water drainage problem. Therefore, the oral representations of defendant's agents did not "vary, add to, or contradict" the construction warranty, and the parol evidence rule does not exclude them. Likewise, the merger clause excludes representations or inducements "other than those" contained in the contract. The construction warranty was part of the integrated agreement, and as the representations of defendant's agents were consistent with its provisions, they were not barred by the merger clause.

II

[4] Defendant next argues that the trial court erred in finding that \$1,474.40 was the reasonable cost of correcting the water damage problem. Plaintiff testified that she hired Calvin Bryant to correct the drainage problem and to do other work, and that \$1,474.40 was the portion of Bryant's total bill representing the amount she paid him to correct the water problem. Calvin Bryant testified that the cost of repairing the water problem was between \$1,500 and \$1,800, that this represented the reasonable cost of repair work, and that he would not have made the charges if they had not been necessary. Defendant offered evidence that a similar problem at plaintiff's neighbor was corrected for \$300, and that an alternative method of repair cost \$400. Based on this evidence, defendant contends that the award of damages was clearly excessive. We disagree.

In a suit for damages arising out of breach of contract, the injured party is to be placed in as near the position he or she would have occupied absent the breach. *Meares v. Construction Co.*, 7

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N.C. App. 614, 173 S.E. 2d 593 (1970). That is, the injured party is to be compensated "for the loss which fulfillment of the contract could have prevented or the breach of it has entailed." *Norwood v. Carter*, 242 N.C. 152, 155, 87 S.E. 2d 2, 4 (1955). See also, *Moss v. Knitting Mills*, 190 N.C. 644, 130 S.E. 635 (1925) (where contract substantially complied with, damages are to be "reasonable cost" of labor to remedy defects).

Ample competent evidence supported the finding that \$1,474.40 was the reasonable cost of correcting the drainage problem. We may not disturb this finding even though the evidence also supported a different conclusion, as findings of fact made by the trial court which resolve conflicts in the evidence are binding on appellate courts. *Trotter v. Hewitt*, 19 N.C. App. 253, 198 S.E. 2d 465, cert. denied, 284 N.C. 124, 199 S.E. 2d 663 (1973). Accord, *Kane Realty Corp. v. Harllee-Quattlebaum Const. Co.*, 424 F. 2d 253 (4th Cir. 1970) (rejecting plaintiff's argument that damages were inadequate where findings supported by "substantial evidence" and not "clearly erroneous").

III

[5] Defendant next argues that it was reversible error to find that the \$400 check tendered to plaintiff by defendant was never accepted by her. Defendant contends that plaintiff's retention of the check from 11 June 1979 until she filed suit constituted an accord and satisfaction or compromise and settlement of any claims she may have had against defendant with respect to the water drainage problem. Again, we find defendant's argument to be without merit.

An "accord" is an agreement whereby one party undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, something other than or different from what the party is or considers him or herself entitled to, and the "satisfaction" is the execution or performance of such agreement. *Allgood v. Trust Co.*, 242 N.C. 506, 515, 88 S.E. 2d 825, 830-1 (1955). Defendant offered evidence that plaintiff agreed \$400 would compensate her for Mr. Bryant's work while plaintiff testified to exactly the opposite. Again, since the trial court's finding of no acceptance and hence no accord and satisfaction is supported by competent evidence, it is conclusive on appeal.

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The defendant argues that because the plaintiff retained the check, albeit without cashing it, for an unreasonable period of time, a finding of accord and satisfaction was required as a matter of law. *FCX, Inc. v. Oil Co.*, 46 N.C. App. 755, 266 S.E. 2d 388 (1980), is distinguishable. *FCX* involved a cashier's check, which is similar to cash and unlike defendant's draft, is not subject to countermand. Furthermore, the creditor in *FCX* retained possession of the check even after the debtor demanded its return.

We are aware that some jurisdictions have adopted a rule that retention of a check without cashing it for an unreasonable period of time constitutes an accord and satisfaction. *See generally*, 1 Am. Jur. 2d, *Accord and Satisfaction* § 23 (1962). In the case before us, however, even if Judge John had found an agreement between the parties, and we had occasion to consider adopting this rule, the facts do not support a constructive execution or "satisfaction" of the agreement under this rule. The words "void after 60 days" are printed on the check. The check was not cashed within the sixty days and in November 1979, defendant received a letter from plaintiff's counsel explicitly rejecting any offer to settle for \$400.

IV

[6] Defendant's final contention is that the trial court erred in finding that Richardson's failure to correct Coble's water drainage problem constituted an unfair trade practice. On this issue, we agree with the defendant, and find that damages were improperly trebled.

The trial court found:

[t]hat the Defendant's acts constituted unfair acts or practices in the conduct of commerce; that the Plaintiff, as a new home vendee stood in an inequitable situation in regard to the Defendant, who was a developer and vendor of new homes, and was therefore oppressed and substantially injured by the activities of the Defendant.

Based on this finding, the trial court concluded that defendant had violated G.S. 75-1.1, North Carolina's Unfair Trade Practice Act, and trebled the \$1,474.40 in compensatory damages pursuant to G.S. 75-16.

The trial court based its conclusion of law on a finding that defendant's behavior was unfair, and not that it was fraudulent or

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deceptive. Although unfair conduct that is neither deceptive nor fraudulent may constitute an unfair trade practice, the evidence at bar did not rise to the level of unfairness as that concept has been defined by our courts. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980). "[A] party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position." *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 700, 303 S.E. 2d 565, 569, *cert. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983).

The case before us involves a breach of contract based on written warranties and oral representations that were essentially restatements of what defendant was already bound to do under the warranty. There is nothing so oppressive or overreaching about defendant's behavior in breaching the contract that would transform the case into one for an unfair trade practice.

Furthermore, cases in this area have laid down a rule that breach of express and implied warranties alone do not constitute a violation of Chapter 75. *See Trust Co. v. Smith*, 44 N.C. App. 685, 262 S.E. 2d 646, *review denied*, 300 N.C. 379, 267 S.E. 2d 685 (1980); *Stone v. Homes, Inc.*, 37 N.C. App. 97, 245 S.E. 2d 801 (1978). The evidence in this case was that defendant breached express warranties it made to the plaintiff. Defendant is thus liable to plaintiff in compensatory damages, but there being no basis in law for a finding of an unfair trade practice, the trial court erred in trebling the damages.

Modified and affirmed.

Judges BRASWELL and EAGLES concur.

State v. Baize

STATE OF NORTH CAROLINA v. JIMMIE HARRISON BAIZE

No. 8315SC1167

(Filed 4 December 1984)

1. Criminal Law § 117.4— accomplice testimony—special scrutiny instruction given after testimony—no error

There was no error when the trial court gave a special scrutiny instruction to the jury regarding an accomplice's testimony only *after* she had presented damaging evidence. The accomplice was not ordered to testify by the judge, defendant did not request an instruction, and the nature of the accomplice's agreement with the prosecutor and her motivation was exhaustively presented to the jury. G.S. 15A-1052(c) (1983).

2. Criminal Law § 89.5— prior statements by witness—admissible for corroboration despite minor variations

Transcripts of two police interviews with an accomplice were properly admitted for the purpose of corroborating the accomplice's testimony. The transcripts and the testimony were consistent except for a few minor details, and the accomplice's admission that she was not telling the truth in the first interview affects credibility, not admissibility, especially since she made the same admission in the interview.

3. Criminal Law § 89.2— transcript of police interview—admissible as corroboration

There was no error in admitting a transcript of a prior police interview to corroborate an accomplice's testimony where the officer who asked the questions in the interview was not the officer who read the transcript in court. The whole testimony, including the questions, is that of the witness rather than the questioner, and it is sufficient if the accomplice's statements, in the context of the questions asked, corroborated her trial testimony.

4. Criminal Law § 80.1— transcript of police interview—no formal authentication—no objection—admissible

There was no error in admitting a transcript of a prior police interview with an accomplice when the transcript had never been formally authenticated and when the court did not give an instruction on its limited corroborative purpose prior to the reading of the transcript. Defendant did not object to the lack of authentication at trial, the accomplice had earlier identified the statement, the transcript of a second interview was properly authenticated and was introduced, and there was no request for instructions prior to the reading of the interview.

5. Narcotics § 1.3— trafficking by possession and delivery—separate crimes

Where defendant was indicted for trafficking in cocaine by possession and delivery, there was no constitutional error in the denial of defendant's motion to dismiss one of the offenses on the grounds that delivery includes possession. G.S. 90-95(h)(3) (Supp. 1983).

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6. Narcotics § 4; Conspiracy § 6— conspiracy to traffic—evidence sufficient

There was sufficient evidence to take a charge of conspiracy to traffic in cocaine to the jury when there was direct evidence of conversations between defendant and an accomplice regarding a sale, direct evidence of arrangements to sell cocaine, and personal participation by defendant in a scheme to deliver cocaine. Although defendant had personal possession of only one of two packages of cocaine sold, the jury had only to infer an implied agreement between defendant and the accomplice to sell both packages.

7. Narcotics § 4— denial of motion to dismiss—failure to properly identify cocaine—general objection only—no error

Where defendant moved to dismiss charges of possession and delivery of cocaine based on the State's failure to properly identify the cocaine, the court properly considered the evidence and denied the motion because defendant's objection had been overruled. On a motion to dismiss, the trial judge must consider all the evidence admitted, whether competent or incompetent; moreover, defendant made only a general objection "for the record" when the cocaine was admitted and did not except to the admission of the evidence. 4A N.C. Gen. Stat. App. I (2A), N.C. R. App. P. 10(a) (Supp. 1983).

8. Narcotics § 4.1— trafficking by possession—insufficient evidence for jury—constructive possession and acting in concert inappropriate

There was insufficient evidence to charge the jury on trafficking by possession of cocaine where two packages of cocaine were involved, each weighing slightly less than 28 grams, and there was no evidence that defendant ever had physical possession or an exclusive possessory interest in a package held by an accomplice, even though the accomplice sold that package along with a package which had been held by defendant. Constructive possession does not apply merely because the accomplice sat in defendant's car, and there was no evidence of any action by defendant to traffic by possession of 28 grams or more of cocaine. G.S. 90-95(h)(3) (Supp. 1983).

9. Criminal Law § 171— conviction for trafficking in cocaine by possession reduced to felonious possession

Where a conviction for trafficking by possession of cocaine was overturned because there was insufficient evidence that defendant had possession of one of two packages needed to make up the statutory amount, but there was evidence that defendant had possession of the other package and the jury must have concluded that defendant had possessed that package to find him guilty, the trafficking offense was reduced to the lesser included offense of felonious possession of cocaine.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 9 July 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 22 August 1984.

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Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

E. Raymond Alexander, Jr., and Grady Joseph Wheeler, Jr., for defendant appellant.

BECTON, Judge.

Defendant appeals from his convictions of felonious delivery of cocaine, conspiracy to traffic in cocaine and trafficking by possession of cocaine.

The principal evidence for the State was the testimony of an accomplice, Ernestine McDowell, given pursuant to an arrangement for truthful testimony. The defendant, Jimmie Harrison Baize, presented no evidence.

The State's evidence tended to show the following events on 30 September 1982. Undercover agents telephoned A. R. Dickey's house several times that day to arrange a cocaine deal. Baize, McDowell and Dickey were there during one of the calls. Dickey told Baize that the buyer wanted "more than we have." However, a meeting was arranged anyway.

Before the three left Dickey's house, Dickey picked up a foil-wrapped packet from the mantelpiece and placed it in his pocket. Dickey and McDowell, riding in McDowell's car, followed Baize in his car. At some point, Dickey and McDowell joined Baize in his car. After dropping McDowell and Dickey off, Baize left alone. He returned soon with a plastic bag containing white powder, which he handed to Dickey. Baize told Dickey that if the buyers "don't want this, don't let them have the other." The three then went to McDowell's car and drove both cars to the pre-arranged spot. Dickey drove McDowell's car; Baize and McDowell rode in Baize's car. While Dickey parked next to the buyer and discussed the deal, Baize and McDowell parked nearby. The three then left to discuss the deal. Baize expressed reservations, but Dickey wanted to go ahead with it.

Dickey then returned to where he had left the buyer. Several minutes later, Baize and McDowell followed him. But Baize drove past the pre-arranged spot when he saw that the police had surrounded Dickey. The police pursued Baize and McDowell, arrested

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them, and conducted searches incident to the arrests. Only Dickey had narcotics with him: The foil-wrapped packet and the plastic bag, each containing 26.7 grams of a mixture containing 30% cocaine.

Baize received concurrent sentences for the three convictions, the mandatory seven years imprisonment and a \$50,000 fine required by N.C. Gen. Stat. § 90-95(h)(3) and (i) (Supp. 1983), for trafficking by possession of cocaine and for conspiracy to traffic in cocaine, and three years imprisonment for felonious delivery of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1) (Supp. 1983).

I

[1] Baize first contends that the trial court committed reversible error by giving a special scrutiny instruction regarding the "grant of immunity" to McDowell only *after* she had already presented extremely damaging evidence. McDowell was not ordered to testify by the judge, but rather testified in exchange for truthful testimony pursuant to an agreement with the prosecutor. N.C. Gen. Stat. § 15A-1052(c) (1983), *requiring* scrutiny instructions, thus did not apply. *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983); *State v. Maynard*, 65 N.C. App. 81, 308 S.E. 2d 665, *disc. rev. denied*, 310 N.C. 628, 315 S.E. 2d 694 (1983). Defendant did not request an instruction and therefore none was required. *Maynard*. The error, if any, in giving the instruction thus operated in Baize's favor. We perceive no prejudice in any event, as the nature of the agreement and McDowell's motivation was exhaustively presented to the jury. *See State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976). This assignment is accordingly overruled.

II

Baize, Dickey and McDowell were all arrested on 30 September 1982. Police interviewed McDowell at length the same day and later prepared a transcript of the interview. On 10 December 1982 police interviewed McDowell again, and a second transcript was prepared. Both transcripts were in question and answer form. Both were read into evidence at trial for the purpose of corroborating McDowell's testimony: the 30 September 1982 transcript by an officer who was present at the interview but did not ask questions, and the 10 December 1982 transcript by the officer

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who conducted the examination. Baize brings forward several assignments of error regarding this evidence.

[2] A. Baize first contends that the testimony was inadmissible because it was not in fact corroborative. The Supreme Court has recently and exhaustively discussed the standards governing the admissibility of corroborative evidence. *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982). The evidence offered for corroboration need not tend to prove the "precise facts" testified to by the witness at trial. *Id.* Slight variances do not render the corroborative evidence inadmissible, but are expected and may even provide some indicia of truthfulness. *Id.* In theory, corroborative evidence comes in, not as proof of the matters therein, but simply as proof that the statement was made. 1 H. Brandis, *North Carolina Evidence* § 52 at 195 n. 62 (2d rev. ed. 1982). Whether the statement in fact corroborates then becomes a question for the jury on proper instruction. *Burns*; 1 H. Brandis, *supra*.

Having reviewed the statements and the trial testimony, we conclude that they do in fact substantially corroborate each other. Except for a few minor details, all three versions of the events of 30 September 1982 are consistent. Baize makes much of the fact that McDowell testified on cross-examination that she had not told the truth in the 30 September interview. This appears to go only to her credibility at trial, however, not the admissibility of the corroborative evidence, especially since she made the same admission in the interview itself. As we have noted, the substance of the stories was the same; significantly, Baize does not point out any substantive inconsistencies. Measured by the substantive standard of *Burns*, the evidence constituted admissible corroborative evidence.

[3] B. Baize also argues that, since the officer who asked the questions did not read the transcript of the September interview in court, the transcript does not corroborate any trial testimony. He cites no authority for his assertion that the questions themselves constituted separate testimony, which required separate corroboration. Of course we are aware that the form of questions asked before the jury may constitute grounds for objection and rulings thereon may even require reversal. See 1 H. Brandis, *supra*, § 31 (leading questions); *id.*, § 137 (hypothetical questions). However, it is well established that, for contextual purposes, the

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whole testimony, including the questions, is that of the witness, not the questioner. The lengthy hypothetical question, to which the witness typically answers very tersely, is a perfect example. *Id.* Leading questions on cross to which the witness is *expected* to answer "yes" or "no," also become part of the testimony of the witness. *Id.* § 35 at 144. *See also* 7 J. Wigmore, *Evidence* §§ 2098, 2099, 2103 (J. Chadbourn ed. 1978); 4 S. Gard, *Jones on Evidence* § 26:28 (6th ed. 1972). We do not believe that the questions needed to corroborate prior testimony; it is sufficient, in light of the substantive test of *Burns*, that McDowell's statements, in the context of the questions asked, corroborated her trial testimony.

[4] C. The transcript of the 30 September interview was never formally authenticated, and Baize now assigns error. However, he failed to object to the lack of authentication at trial. *See State v. Covington*, 34 N.C. App. 457, 238 S.E. 2d 794 (1977), *disc. rev. denied and appeal dismissed*, 294 N.C. 184, 241 S.E. 2d 519 (1978) (general objection insufficient to challenge authenticity on appeal). We also note that McDowell had earlier identified the statement on Baize's cross-examination of her, and that the second transcript was properly authenticated and introduced. No reversible error appears.

Baize also assigns error to the trial court's failure to instruct the jury, prior to the reading of the first interview, on its limited corroborative purpose. It is well settled, however, that such a failure does not constitute reversible error absent a request for such instructions. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979) (capital case). Accordingly, this assignment of error, like the others in this group, is without merit.

III

[5] Baize was originally indicted for two substantive trafficking offenses, possession and delivery, although the delivery charge was subsequently reduced to simple felonious delivery. He asserts constitutional error in the trial court's refusal to dismiss one of the substantive offenses, arguing that delivery necessarily includes possession. This Court has affirmatively interpreted the enumerated acts which constitute trafficking pursuant to G.S. § 90-95(h)(3) (Supp. 1983) as separate crimes. *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982), *followed State v. Sanderson*, 60 N.C. App.

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604, 300 S.E. 2d 9, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983). We relied in *Anderson* on a long line of authority interpreting similar statutory provisions. See for example *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). Although we are aware of Chief Judge Vaughn's expressions of concern in *Sanderson* about the *Anderson* Court's broad statutory interpretation of G.S. § 90-95(h)(3) (Supp. 1983), we follow these holdings. These two assignments of error are therefore overruled.

IV

[6] Baize contends that the State did not present sufficient evidence to take the charge of conspiracy to traffic to the jury and that the trial court thus erred in denying his motion to dismiss. The law governing the sufficiency of evidence of conspiracy was reviewed comprehensively by our Supreme Court in *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982). The Court restated the familiar principle that in considering challenges to the sufficiency of the evidence, the evidence is to be considered in the light most favorable to the State along with every reasonable inference therefrom. *Id.* The State need not prove an *express* agreement; evidence tending to show a mutual, implied understanding will suffice. *Id.*; *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). In *LeDuc*, the Court held that since the jury had to infer defendant's identity and actions, his presence at the scene of the crime at the time his alleged unknown co-conspirators were present with the contraband, and *then* that there had been an agreement with the other unknown persons, the State violated the rule against "stacking" inferences and thus presented insufficient evidence.

In the present case, on the other hand, there was *direct* evidence of conversations between Baize and Dickey regarding a sale, *direct* evidence of arrangements to sell cocaine, and *personal participation* by Baize in a scheme to deliver cocaine. Eyewitness evidence showed that, after Baize's and Dickey's *original discussions*, Dickey took a package with him, Baize delivered another package to Dickey, and the two packages contained enough cocaine to satisfy the statutory amount. The jury only had to infer that there was an implied agreement between Baize and Dickey to sell both packages of cocaine. Once the jury reached that conclusion, the crime of conspiracy to traffic was complete. *LeDuc*;

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State v. Bindyke, 288 N.C. 608, 220 S.E. 2d 521 (1975). Although Baize personally may never have possessed the first package, he may still be found criminally liable as a member of the conspiracy. *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633, *cert. denied*, 409 U.S. 888, 34 L.Ed. 2d 145, 93 S.Ct. 194 (1972) (equal criminal responsibility for murder); *State v. Davis*, 203 N.C. 13, 164 S.E. 737, *cert. denied*, 287 U.S. 649, 77 L.Ed. 561, 53 S.Ct. 95 (1932) (equal responsibility where physically impossible to have committed crime). The trial court correctly denied the motion to dismiss.

V

[7] Baize also contends that the State failed to properly identify the cocaine introduced into evidence, and therefore argues that his motion to dismiss the possession and delivery charges was improperly denied. In considering a motion to dismiss, the trial judge must consider all the evidence admitted, whether competent or incompetent. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978). Baize made only a general objection, "for the record," at the time the cocaine was received into evidence, which objection was overruled. The court properly considered the evidence in ruling on Baize's motion. *Id.* Assuming, *arguendo*, that Baize had excepted to the admission of the evidence, which he did not, his exception would not have validated his general objection at trial. See 1 H. Brandis, *supra*, § 27. The critical evidence being unexcepted to, and the evidence otherwise appearing sufficient, the assignment is overruled. 4A N.C. Gen. Stat. App. I (2A), N.C. R. App. P. 10(a) (Supp. 1983).

VI

[8] A conviction for "trafficking in cocaine" requires the sale, manufacture, delivery, transportation, or possession of 28 *grams or more* of the substance. G.S. § 90-95(h)(3) (Supp. 1983). In this case, neither the foil-wrapped packet nor the plastic bag alone contained the statutory minimum. Each weighed 26.7 grams. Baize argues that the trafficking by possession conviction cannot stand, since there is no evidence that he ever possessed the foil-wrapped packet of cocaine. There was no evidence that Baize ever personally had physical possession of the foil-wrapped packet. All the evidence showed that the packet was on Dickey's mantelpiece, that Dickey put it in his pocket, and then rode

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around with Baize in McDowell's and Baize's cars before being arrested.

The State argues that Baize's participation in the arrangements for the deal established a concert of action and thus constructive possession of the cocaine. The State cites no North Carolina authority for applying the concert of action theory to possession of narcotics. We have found no cases to support a conviction for possession of drugs under the acting in concert doctrine when the drugs are on another person and entirely under that person's physical control. We therefore hold that the concert of action doctrine does not apply here and that the State accordingly failed to present sufficient evidence to support a conviction of trafficking by possession.

The doctrine of constructive possession applies when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over a controlled substance. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983); *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974). Numerous cases have considered this doctrine. No single factor controls. Constructive possession has been found when the narcotics were (1) on property in which the defendant had some exclusive possessory interest and there is evidence of his or her presence on the property, see *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972) ("close juxtaposition" rule) (defendant in own home near drugs); (2) on property of which defendant, although not an owner, had sole or joint physical custody, see *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984) (defendant had key and was seen repeatedly at apartment); *State v. Bagnard*, 24 N.C. App. 54, 210 S.E. 2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E. 2d 796 (1975) (defendant had keys and custody of car); *State v. Summers*, 15 N.C. App. 282, 189 S.E. 2d 807, cert. denied, 281 N.C. 762, 191 S.E. 2d 359 (1972) (drugs found in enclosed and protected yard next to house where defendant lived with others); or (3) in an area which the defendant frequented, usually near his or her property, see *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1979) (defendant often in pig shed sixty feet from his house); *State v. Owen*, 51 N.C. App. 429, 276 S.E. 2d 478 (1981), cert. denied, 305 N.C. 154, 289 S.E. 2d 382 (1982) (worn path from defendant's trailer to marijuana patch; other neighbor testified for defendant and denied knowledge).

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In the cited constructive possession cases, the drugs were never found on another person. Baize had no exclusive possessory interest, nor did he have physical custody of the foil-wrapped packet. Moreover, the facts of this case do not match "access" cases such as *Spencer* or *Owen*, dealing with stationary physical structures, rather than other persons. We conclude that Baize did not have constructive possession of the drugs, based on the ownership, or custody of or access to property theories discussed *supra*. The State does not advance, nor do we find authority to support, the proposition that Baize had constructive possession simply because Dickey sat in Baize's car for a time.

Similarly, there is no direct evidence that Baize controlled or directed Dickey's activities. See *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). When the original arrangements were being made, it was Dickey, not Baize, who talked to the buyers. Dickey, not Baize, controlled *both* bags and made the decision to go ahead with the sale.

We are aware that our Supreme Court has upheld a conviction for possession of *burglary tools* under the acting in concert doctrine. *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968). There, however, both defendants were observed at the door of a restaurant, which showed evidence of tool marks around the lock, and the officer who approached observed one defendant toss away the screwdriver and hammer. The *Lovelace* Court found that the tools were accessible to both men under circumstances indicating joint action in a criminal purpose. As we have noted above, Baize never had access to the foil-wrapped packet of cocaine, and Baize was not actually present at the scene when Dickey was arrested. And there is no evidence of any action on Baize's part in furtherance of the substantive criminal act at issue, trafficking by possession of 28 grams or more of cocaine. We have found no acting in concert case in which the State was allowed to leap, in one single bound, the double hurdles of constructive presence *and* constructive possession. To allow the State to do so on the facts of this case would effectively permit the State to stack inference upon inference and would obliterate whatever distinction remains between conspiracy and acting in concert. It is to be recalled that we have upheld Baize's conspiracy to traffic in cocaine conviction.

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[9] Having concluded that there was insufficient evidence to charge the jury on trafficking by possession of cocaine, we consider the jury's verdict as it relates to the lesser included offense of felonious possession of cocaine, G.S. § 90-95(d) (Supp. 1983). To find Baize guilty of trafficking by possession, the jury must have concluded that he possessed the plastic bag of cocaine. Our ruling on the foil-wrapped packet does not disturb this finding. Possession of the 26.7 gram plastic bag alone was sufficient to support a conviction of the lesser included offense of felonious possession of cocaine, on which the jury was properly instructed. Baize's conviction of trafficking by possession must therefore be reduced to the lesser included offense of felonious possession of cocaine. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). Since the sentences for Baize's three convictions run concurrently, and since the reduction does not affect the conspiracy to traffic conviction which also carries a mandatory seven-year sentence and \$50,000 fine, G.S. § 90-95(i) (Supp. 1983), no resentencing hearing is required.

VII

We conclude that, with the exception of the one error, defendant received a fair trial, free of prejudicial error. We affirm the felonious delivery and conspiracy to traffic convictions. The conviction for trafficking by possession in case 82CRS15064 is vacated and the cause remanded solely to correct the judgment in accordance with this opinion.

No error on the trial; remanded for correction of judgment in case 82CRS15064.

Judges HILL and BRASWELL concur.

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MAURICE ROSS, EMPLOYEE-PLAINTIFF v. YOUNG SUPPLY COMPANY, EMPLOYER-DEFENDANT, AND HARTFORD ACCIDENT & INDEMNITY INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8310IC1251

(Filed 4 December 1984)

1. Master and Servant § 55.3— workers' compensation—injury by accident

Plaintiff traveling salesman suffered an injury by accident when his leg was broken while he was getting into his wife's automobile in preparation for making sales calls on behalf of his employer where the evidence showed that plaintiff usually drove his own vehicle in making sales calls; plaintiff decided to drive his wife's automobile because she had complained about the way it was running; and as plaintiff was maneuvering his large frame into his wife's automobile in a different manner than normal to compensate for the fact that the driver's seat was pushed all the way forward, plaintiff's foot slipped on the frozen ground and his leg was broken.

2. Master and Servant § 55.5— workers' compensation—injury arising out of employment

Plaintiff salesman's accident resulting in a broken leg while he was getting into his wife's automobile in preparation for making sales calls on behalf of his employer arose out of his employment although he was driving his wife's automobile rather than his own vehicle in order to check its running condition.

3. Master and Servant § 55.6— workers' compensation—injury in course of employment

Plaintiff salesman's accident while getting into his wife's automobile at his own home in preparation for making sales calls on behalf of his employer arose in the course of plaintiff's employment.

4. Evidence § 50.2— expert medical testimony—cause of injury—statements by plaintiff during treatment

Statements made by plaintiff to a physician in the course of treatment and diagnosis were proper evidence upon which the physician could base his expert opinion that plaintiff's broken leg was caused by plaintiff's slipping while entering an automobile. G.S. 8-58.12.

5. Master and Servant § 56— workers' compensation—cause of injury

The evidence was sufficient to show that plaintiff salesman's broken leg suffered when his foot slipped on the frozen ground as he attempted to enter an automobile in a different way than normal because the seat had been pushed forward was the result of a risk of his employment although plaintiff suffered from a disease which caused affected bones to be more fragile and subject to breaking. G.S. 97-2(6).

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APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award by Full Commission filed 16 August 1983. Heard in the Court of Appeals 21 September 1984.

This is a workers' compensation claim in which plaintiff-employee seeks workers' compensation benefits for an injury allegedly suffered in an accident arising out of and in the course of his employment.

Plaintiff, a traveling salesman employed by defendant Young Supply Company (Young), was injured while getting into his wife's automobile in preparation for making sales calls on behalf of his employer. Plaintiff usually drove his own automobile, a Honda station wagon. However, plaintiff decided to drive his wife's automobile, a Ford Maverick, on his sales calls in Charlotte on 26 January 1981.

Plaintiff is six feet, two inches tall and weighs approximately two hundred twenty-five pounds. The front seat of the Ford Maverick was pushed up and under the steering wheel to accommodate the smaller frame of his wife. The temperature was in the teens and there was a light frost on the lawn. Plaintiff was wearing a heavy coat. As plaintiff maneuvered into the confines of the Ford Maverick, he placed his right leg in the automobile but his left foot remained on the ground with his left leg bearing most of his weight. As he continued to maneuver into the automobile, he slipped and his left leg gave way. The leg was broken.

In the course of treatment for plaintiff's broken leg Dr. Richard Wrenn at Miller Clinic, Charlotte, North Carolina, diagnosed him as having Paget's disease, a malady that causes bones affected to be more fragile and subject to breakage. Plaintiff was unaware, prior to this diagnosis, that he was afflicted with Paget's disease. Dr. Wrenn's examination revealed that the leg fracture occurred in an area affected by this disease.

On 2 September 1982, the Honorable John Charles Rush, Deputy Commissioner, held that plaintiff did not, at the time complained of, sustain an injury by accident arising out of and in the course of his employment by Young and denied plaintiff benefits under the Workers' Compensation Act. Plaintiff appealed to the Full Commission. On 16 August 1983, the Full Commission held that the decision reached by Deputy Commissioner Rush was in-

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correct in that the greater weight of the evidence showed that plaintiff did sustain an injury by accident arising out of and in the course of his employment as a traveling salesman for defendant-employer Young. The Full Commission awarded compensation for all medical expenses incurred as a result of the injury by accident on 26 January 1981, temporary total disability at the rate of \$118.87 per week for 22.29 weeks and permanent partial disability at the rate of \$118.97 per week for 20 weeks beginning in January 1982. The Full Commission also awarded attorneys' fees equal to 25% of all compensation paid except medical expenses. Defendants appealed.

Joseph B. Roberts, III, for plaintiff-appellee.

Hedrick, Eatman, Gardner, Feerick and Kincheloe, by Hatcher Kincheloe and Edward W. Hedrick, for defendant-appellants.

EAGLES, Judge.

All assignments of error can be resolved by a determination of whether the injury, suffered by plaintiff on 26 January 1981, was the result of an accident arising out of and in the course of plaintiff's employment by defendant Young.

We note that defendants do not contend that the findings and conclusions of the Full Commission are not supported by competent evidence in the record so as to make those findings and conclusions erroneous and contrary to law.

Findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even when there is evidence to support a contrary finding of fact. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). Defendants' arguments on appeal show that there is evidence in the record which could support findings of fact contrary to those reached by the Full Commission. However, absent a showing that the facts and conclusions found by the Full Commission are not supported by competent evidence, defendants may not prevail on appeal.

In our discretion, we have examined the record to determine whether there is competent evidence to support the Full Commission's findings of fact and conclusions of law. We hold that there is such competent evidence.

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I

[1] The crucial findings of fact of the Full Commission as to whether there was an accident as contemplated by the Workers' Compensation Act are contained in paragraphs 1-5 of its findings of fact. In deciding whether there was an accident, the only question on appeal is whether there was "an unlooked for and untoward event" or "the interruption of the routine work and the introduction thereby of unusual conditions." *Gladson v. Piedmont Stores/Scotties Discount Drug Store*, 57 N.C. App. 579, 292 S.E. 2d 18, *rev. denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982).

As set out in the findings of fact, plaintiff was a 55 year old man who was a traveling salesman and used his own vehicle in his travels on behalf of his employer. For over four years, plaintiff had driven his 1977 Honda station wagon, calling on various beauty and barber shops in his sales territory. Plaintiff worked out of his home and left there regularly to make his sales calls. On the morning in question he decided to drive his wife's automobile, a 1973 Ford Maverick, because she was complaining about the way it was running. He rarely drove his wife's automobile and had not driven it on a sales call in two or three years. The manner of getting into his wife's automobile was different than the way he normally entered his own automobile. Plaintiff is a large-framed man, six feet, two inches tall and weighing approximately two hundred twenty-five pounds. While he normally has no difficulty getting into his Honda station wagon, getting into his wife's Ford Maverick required plaintiff to maneuver his large frame into an automobile in which the front seat was pushed all the way forward. Instead of merely sitting down into the front seat, plaintiff was forced to wedge himself under the steering wheel by placing his right leg into the automobile while placing most of his two hundred twenty-five pound weight on his left leg which remained outside the automobile. This required a twisting motion of the body which caused plaintiff to slip on the frozen ground.

There was evidence properly before the Full Commission in the form of testimony from Dr. Wrenn tending to show that plaintiff "either was getting in or out of his car and twisted his leg and slipped and broke his leg . . . [h]e was twisting, I think, getting into or out of his car." This testimony was corroborated and

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clarified by plaintiff who testified that he was getting into the automobile at the time of his injury.

In a similar case, *Coffey v. Automatic Lathe Cutterhead*, 57 N.C. App. 331, 291 S.E. 2d 357, *rev. denied*, 306 N.C. 555, 294 S.E. 2d 222 (1982), the claimant, a traveling salesman, felt a sharp pain as he reached across his front seat to dislodge a clipboard from between the seat and the passenger-side front door. At the time of his injury, claimant's automobile was parked, the driver's door was open and claimant's left foot was out of the car and planted upon the ground. The court held that the clipboard being off the front seat and not in easy reach, served to interrupt the claimant's usual routine of work and introduced unusual conditions which were likely to result in unexpected consequences. In particular, we held "the accident suffered by [the claimant] was the subjecting of his torso and back to significant and unusual stress due to the strained position he assumed in reaching for his clipboard. His injury was caused by this accident." 57 N.C. App. 335, 291 S.E. 2d at 360. Further, we noted that the claimant in *Coffey* was not "engaged merely in exiting his car in the manner in which he normally exited his car." (Emphasis added.) 57 N.C. App. at 335, 291 S.E. 2d at 359.

The facts here tend to show that plaintiff was not entering his automobile in the manner in which he normally entered his automobile. In fact he was maneuvering his large frame into a different automobile than his usual vehicle and was doing so in a different manner than normal to compensate for the fact that the driver's seat was pushed all the way forward. Added to this is evidence that plaintiff slipped as well. The Full Commission's finding of fact is supported by competent evidence.

II

[2] Next, we consider whether the accident arose out of and in the course of plaintiff's employment by defendant Young. The terminology "arising out of" and "in the course of" employment is not used disjunctively and they are not synonymous. Both conditions must be present before compensation can be awarded. The words "arising out of" refer to the origin or cause of the accident. The employee must be about his master's business. *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 2d 387 (1947). The words "in the course of" refer to the time, place, and circumstances under

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which an accident occurred. The accident must occur during the period and place of employment. *Plemmons v. White's Service*, 213 N.C. 148, 195 S.E. 370 (1938). Defendant argues that plaintiff was not about his master's business. Rather, defendant contends that plaintiff was performing personal business, driving his wife's automobile to check its running condition. We disagree.

While it is true that plaintiff was driving his wife's automobile instead of his usual car, and as a result would be able to check its running condition, plaintiff was about his master's business as well, going from his home to Charlotte to make sales calls for his employer. We recognize that an injury to an employee, while he is performing acts for the benefit of third persons, is not compensable *unless* the acts benefit the employer to an appreciable extent. There can be no doubt that plaintiff's driving of his wife's automobile to make his sales calls would have benefited his employer just as if plaintiff had driven his own automobile to make these calls. See, *Guest v. Brenner Iron and Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955). Based on the record before us, there was competent evidence from which the Full Commission could find and conclude that plaintiff's accident "arose out of" his employment.

[3] Defendant next argues that the accident did not arise "in the course of" plaintiff's employment. The basis of this argument is that plaintiff was still at home preparing to travel to places where he would engage in his occupation. We disagree.

We recognize that, as a general rule, accidents sustained while an employee is going to and from work are not within the course of the employment. *Humphrey v. Quality Cleaners and Laundry*, 251 N.C. 47, 110 S.E. 2d 467 (1959). However, there are several exceptions to this general rule. If travel is contemplated as a part of the work, accident in travel is compensable. *Yates v. Hajoca Corporation*, 1 N.C. App. 553, 162 S.E. 2d 119 (1968). This exception is often referred to as the "traveling salesman's exception" to the "going and coming rule." Travel in plaintiff's own transportation was obviously contemplated by the employer Young as part of the work performed by plaintiff. We hold that under the facts of this case getting into an automobile prior to driving out of one's driveway to make sales calls is a necessary part of traveling and goes beyond mere preparation to travel. Ac-

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cordingly, there was competent evidence from which the Full Commission could find and conclude that plaintiff's accident arose "in the course of" plaintiff's employment.

III

[4] Finally, we examine the issue of causation. The basis of defendant's argument is that the injury was caused by plaintiff's pre-existing Paget's disease and that there was insufficient evidence to support Dr. Wrenn's opinion that the injury was caused by plaintiff's slipping while entering the automobile. Dr. Wrenn's testimony was taken in an earlier proceeding on 12 May 1982 before the Honorable Linda Stephens, Deputy Commissioner. Dr. Wrenn testified in response to the following hypothetical question:

And Doctor, let me ask you a hypothetical question. Assuming that the Commission finds from the facts I'll give you in the question, and based upon your own physical examination of Mr. Ross, the history he gave you and your own treatment of him and x-rays taken, that he usually operated his own vehicle as a traveling salesman, but on this occasion was going to use his wife's vehicle, which was somewhat awkward for him to get into, and on this morning the ground was frozen and in the process of getting in under the front steering wheel, when his body was twisted, he slipped and suffered severe pain to his left leg and was immobilized at that time and was taken by a neighbor directly to your office, and that based upon those facts and other facts that you have testified about and that you have to your own knowledge, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether or not the fracture sustained by Dr. Ross on or about January 26, 1981, could or might have been caused by this trauma or the position that he assumed or slipping that he has testified about?

Dr. Wrenn answered over objection that the injury was caused by the trauma or position plaintiff assumed or plaintiff's slipping as he entered the automobile.

Defendant argues that plaintiff did not testify that he slipped and that Dr. Wrenn's testimony indicated that he was not sure

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whether or not plaintiff had slipped. Defendant contends that plaintiff's slipping was not a fact in evidence and a hypothetical question incorporating that fact was improper. We disagree.

We note that hypothetical questions are no longer required to elicit an opinion from an expert witness. G.S. 8-58.12. This statute was in effect at the taking of Dr. Wrenn's testimony on 12 May 1982. However, hypothetical questions are still permitted. A proper hypothetical question lists facts which may be found by the finder of fact and asks if, assuming that the fact finder will so find, the expert has an opinion satisfactory to himself on the subject of the inquiry. To be acceptable, the question must list only such facts as are directly in evidence or may justifiably be inferred therefrom. 1 Stansbury, North Carolina Evidence, Section 137 (Brandis Rev. 1982).

A close examination of the record reveals that Dr. Wrenn's testimony was to the effect that plaintiff told him that he had slipped "either getting in or out of his car" and twisted his leg. Dr. Wrenn was only "not sure" as to whether plaintiff was getting into or out of his car at the time he slipped. Dr. Wrenn's testimony indicates no confusion as to whether plaintiff slipped. These statements by plaintiff were made to Dr. Wrenn in the course of treatment and diagnosis and were proper evidence upon which Dr. Wrenn could base his expert opinion.

[5] Defendant further argues that plaintiff's injury was caused solely by his idiopathic condition, diagnosed as Paget's disease, and cannot fairly be traced to the employment since plaintiff would have been equally exposed apart from employment. The basis of defendant's argument is that entering an automobile in which the seat has been pulled forward is a risk which is common to the public at large. On the facts of this case, we disagree. If we were to accept defendant's contentions, traveling salesmen could never recover for accidents in their travel since those risks are inherent in traveling and are common to the public at large. The distinction in this case is that as a condition of employment, plaintiff was required to use his own personal transportation and was required to travel from his home throughout his territory to make sales on behalf of his employer. To travel and use his own transportation here meant that plaintiff had to maneuver into his wife's automobile on the day in question. The difficulty en-

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countered by plaintiff in attempting to maneuver his large frame into his wife's automobile was a risk which plaintiff was obliged to undertake in order to make his sales calls and further his employer's interests. Unlike the public at large, plaintiff incurred his injury as a result of a risk attributable to his travel which was contemplated as part of his employment.

As to causation, Dr. Wrenn testified that "[w]ith Paget's disease, it would not be likely that the bones would break on their own accord without some trauma or mishap."

Where an injury is associated with any risk attributable to the employment, compensation should be allowed, even though an employee may have suffered from an idiopathic condition which precipitated or contributed to the injury. G.S. 97-2(6); *Hollar v. Montclair Furniture Company, Inc.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980). In this case there is competent evidence of a risk attributable to plaintiff's employment and an injury as a result of that risk. For all of the reasons herein, we find no error in the findings and conclusions of the Full Commission.

Our decision in this case supports the rule that the Workers' Compensation Act is to be liberally construed and applied to accomplish the humane purposes for which it was enacted, compensation for injured employees.

No error.

Judges WEBB and BRASWELL concur.

THEODORE R. ANDERSON, PLAINTIFF EMPLOYEE v. CENTURY DATA SYSTEMS, INC., DEFENDANT EMPLOYER, AND INTEGON INDEMNITY CORP., DEFENDANT CARRIER

No. 8410IC293

(Filed 4 December 1984)

1. Master and Servant § 58— workers' compensation—defense of intoxication—burden of proof

In asserting the defense of intoxication under G.S. 97-12, the employer is not required to come forward with evidence disproving all possible causes

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other than intoxication or to prove that intoxication was the sole proximate cause of the employee's injuries; rather, the employer is required to prove only that the employee's intoxication was more probably than not a cause in fact of the accident resulting in injury to the employee.

2. Master and Servant § 58— workers' compensation—intoxication of employee—insufficient findings

The Industrial Commission's finding that "it has not been proven that plaintiff's injuries were proximately caused by intoxication" was insufficient to resolve issues regarding the defense of intoxication raised by the evidence where defendant employer offered substantial evidence tending to show that the accident was proximately caused by plaintiff's intoxication.

3. Master and Servant § 58— workers' compensation—intoxicants provided by employer—insufficient evidence

There was no competent, credible evidence in the record to raise an issue as to whether defendant employer provided intoxicants to plaintiff employee.

APPEAL by defendants employer and carrier from opinion and award of the North Carolina Industrial Commission filed 9 November 1983. Heard in the Court of Appeals 27 November 1984.

Plaintiff filed this claim under the Workers' Compensation Act, claiming that injuries sustained by him in a motor vehicle collision occurred as a result of an accident arising out of and in the course of his employment. Following a hearing and after consideration of additional evidence received in the form of depositions, the Industrial Commission made findings of fact and conclusions of law and entered an opinion and award directing defendants to pay plaintiff compensation. Defendants appealed.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Sanford W. Thompson, IV, for plaintiff, appellee.

Horton & Michaels, by Walter L. Horton, Jr., for defendants, appellants.

HEDRICK, Judge.

The following facts are undisputed: Plaintiff-employee is a field service technician employed by defendant to service "computer-type" cash registers sold by defendant-employer. Defendant provided plaintiff a car to use in making service calls, and assigned him a "service territory" in southeastern North

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Carolina. On 13 March 1980 plaintiff reported to defendant-employer's Wilmington office and was instructed to go to Myrtle Beach, outside his service territory, to repair a slip printer at the Litchfield Beach Inn. Plaintiff left Wilmington at approximately 10:30 a.m. and arrived in Myrtle Beach at approximately noon. After completing his assigned work at the Litchfield Beach Inn, plaintiff and two other employees went to a steakhouse. One employee, a Branch Manager for defendant-employer in South Carolina, bought beer for himself, plaintiff, and the third employee. At approximately 1:30 a.m., while returning to Wilmington from Myrtle Beach, plaintiff was seriously injured in an accident occurring when the car he was driving veered into the path of an oncoming Mack Tractor Trailer unit. Testing on a blood sample taken from plaintiff at approximately 2:30 a.m. on 14 March 1980 revealed a blood-alcohol level of .199%.

At the hearing on plaintiff's claim for benefits under the Workers' Compensation Act, the parties stipulated that "Defendants plead the provisions of 97-12 with reference to intoxication in bar of the claim." G.S. 97-12 in pertinent part provides:

No compensation shall be payable if the injury or death to the employee was proximately caused by:

(1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee;

In support of their contention that plaintiff's injuries were proximately caused by his intoxication, defendants introduced evidence tending to show that on the evening of 13 March 1980 plaintiff drank one or two beers between 8:00 and 9:00. Plaintiff returned to his car at approximately 9:30, and he was not intoxicated at that time. At approximately 1:30 a.m. plaintiff was observed by William J. Davis on Highway 17, approximately fifty miles north of Myrtle Beach. Mr. Davis, who was driving a Mack Tractor Trailer unit in the southbound lane, first observed plaintiff when he was about three-quarters of a mile away. Mr. Davis saw the vehicle driven by plaintiff round a curve, at which time the car crossed the center lane, with "most of the car" in the southbound lane. Mr. Davis prepared to stop and flashed his headlights, whereupon plaintiff's car returned to the northbound lane. When the vehicles were approximately 45 feet apart, plain-

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tiff's car again veered into the truck's path, and the collision occurred.

Plaintiff testified that he is unable to remember any of the events surrounding the accident.

The findings of fact made by the Commission from the evidence in the case pertinent to the issue of plaintiff's intoxication are as follows:

6. Plaintiff completed his work at the Litchfield Beach Inn between 6:00 and 7:00 p.m. and he and Bernie returned to Myrtle Beach where they met Mr. Frie at the steak house at approximately 8:00 p.m. The three men stayed at the steak house for about one hour and drank two or more bottle of beer each which beer was purchased by Mr. Frie. Thereafter, Mr. Frie left the steak house at approximately 9:00 p.m.

7. Plaintiff and Bernie remained at the steak house for about another hour. . . . The two men then left the steak house and went to the place in Myrtle Beach where Bernie had left his automobile. . . . The two men then parted. . . .

8. At approximately 1:30 a.m. on 14 March 1980 the Pinto which plaintiff was driving rounded a curve partly in the wrong side of the road headed in a Northerly direction on U.S. Highway 17 . . . 50 or more miles North of Myrtle Beach on the highway. . . .

9. There was headed on the same stretch of straight highway in a Southerly direction at the same time a Mack Tractor pulling a tanker trailer. Such rig was driven at a speed of approximately 55 miles per hour by William J. Davis. The weather was fair and clear. Davis observed the vehicle driven by plaintiff being driven back on the right Northbound lane and of such Pinto being driven straight down the highway at a reasonable rate of speed. Nothing abnormal occurred until the vehicles were only about 45 feet apart. At such time the Pinto suddenly veered into Mr. Davis' lane of travel and the two vehicles collided with the left front of the Pinto striking the left front of the Mack Tractor Trailer.

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10. . . . Plaintiff's blood alcoholic content upon hospitalization was .199%. At least a portion of the alcohol plaintiff consumed in the hours prior to his injury by accident was supplied by an agent of defendant-employer acting in his supervisory capacity.

. . .

12. It has not been proven that plaintiff's injuries were proximately caused by intoxication.

Based on the above findings, the Commission made what it termed a conclusion of law:

1. On 14 March 1980 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer. It has not been proven that such injury by accident was proximately caused by intoxication. G.S. 97-2(6); G.S. 97-12; *Yates v. Hajoca Corp.*, 1 N.C. App. 553; *Lassiter v. Town of Chapel Hill*, *supra*, *Inscoc v. Industries*, 292 N.C. 210; *Smith v. Central Transport*, 51 N.C. App. 316. However, even if it had been concluded that intoxication was a proximate cause of plaintiff's accident, at least a portion of the alcohol consumed by the plaintiff in the hours prior to his injury was supplied by an agent of defendant-employer acting in his supervisory capacity.

The only question raised on this appeal relates to the affirmative defense described in G.S. 97-12, which provides that an employer is relieved of his obligations under the Workers' Compensation Act where an employee's injury is proximately caused by that employee's intoxication.

It is the duty of the Commission to make findings of fact resolving all issues raised by the evidence given in the case. The evidence in the instant case raises two issues: (1) whether plaintiff was intoxicated at the time of the accident, and (2) if so, whether the accident was proximately caused by his intoxication.

In regard to the first issue, whether plaintiff was intoxicated at the time of the accident, we note that the Commission did not make an express ultimate finding of fact on this point. Examination of the evidentiary findings made by the Commission, however, persuades us that the Commission implicitly found that

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plaintiff was intoxicated at the time of the accident. Indeed, the evidence would not support a finding to the contrary.

[1, 2] We next consider the Commission's findings with respect to whether the accident was proximately caused by plaintiff's intoxication. In this regard, we hold the Commission's statement, labeled a finding of fact, that "[i]t has not been proven that plaintiff's injuries were proximately caused by intoxication," insufficient to resolve the issue raised by the evidence on this point. We further hold that the Commission's statement is affected by error of law, made manifest in the following additional language in the Commission's opinion:

The cause of plaintiff's motor vehicle veering across the highway into the path of the Mack Tractor is unknown. There are various possibilities as to the cause which would appear to include the possibility of plaintiff dozing or falling asleep, the possibility of his attention being diverted by some unknown cause, the possibility of his suddenly becoming ill, and the possibility of the incident being caused by intoxication. A finding of fact concerning any of such possibilities would, in the opinion of the undersigned, be based upon suspicion and conjecture.

Under G.S. 97-12, the employer has the burden of proof on the affirmative defense of intoxication. See *Smith v. Central Transport*, 51 N.C. App. 316, 276 S.E. 2d 751 (1981). The Commission misconstrues, however, the nature of the employer's burden. The employer is not required to come forward with evidence disproving all possible causes other than intoxication. Nor is he required to prove that intoxication was the sole proximate cause of the employee's injuries. *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E. 2d 458 (1982). In asserting the defense of intoxication set out in G.S. 97-12, the employer is required to prove only that the employee's intoxication was more probably than not a cause in fact of the accident resulting in injury to the employee. *Id.*; see also *Plumbing Co. v. Supply Co.*, 11 N.C. App. 662, 182 S.E. 2d 219 (1971) (discussing meaning of "greater weight of the evidence").

In the instant case the employer offered substantial evidence tending to show that the accident was proximately caused by plaintiff's intoxication, and a finding to this effect, if made by the Commission, would be supported by the evidence. A finding that

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plaintiffs "attention [was] diverted by some unknown cause," on the other hand, would be entirely without support in the evidence in the record. The Commission is thus incorrect in saying that "[a] finding of fact concerning any of such possibilities would . . . be based upon suspicion and conjecture." The Commission may or may not find the evidence introduced by defendant credible, but it must in any case make definitive findings of fact based on its assessment of the evidence.

We are cited by plaintiff to *Yates v. Hajoca Corp.*, 1 N.C. App. 553, 162 S.E. 2d 119 (1968) and *Lassiter v. Town of Chapel Hill*, 15 N.C. App. 98, 189 S.E. 2d 769 (1972) (both cases involving G.S. 97-12 prior to its amendment in 1975), in support of his contention that the Commission's statement in Finding of Fact No. 12 is sufficient to resolve all issues regarding the defense embodied in G.S. 97-12. We hold these cases clearly distinguishable on their facts, but in any event we repudiate any suggestion in either case that the Commission is not required to make definitive findings resolving all issues raised by the evidence. In *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952), our Supreme Court considered facts similar to those of the instant case. In *Thomason* the Industrial Commission found as facts that (1) "we have no way of knowing what transpired . . . between 3:15 A.M. . . . and approximately 5:00 o'clock A.M., when the fatal wreck occurred;" (2) "the cause of the collision remains unexplained;" and (3) "the death of [the employee] was not occasioned by . . . intoxication." *Id.* at 604, 70 S.E. 2d at 707. Labeling these findings "mere conclusions," *id.* at 606, 70 S.E. 2d at 709, Justice Ervin emphasized the importance of proper findings of fact, saying, "[They] should tell the full story of the event giving rise to the claim for compensation." *Id.* at 605, 70 S.E. 2d at 709. The Court went on to say that the finding that the plaintiff's death was not occasioned by his intoxication was "destroyed by the antagonistic finding that 'the cause of the collision remains unexplained.'" *Id.* at 606, 70 S.E. 2d at 709. See also *Coleman v. City of Winston-Salem*, 57 N.C. App. 137, 291 S.E. 2d 155, *disc. rev. denied*, 306 N.C. 382, 294 S.E. 2d 206 (1982), *cert. denied*, 459 U.S. 1112 (1983) (remanding proceeding to Industrial Commission for more specific findings where Commission found only that there was "no evidence that the death was caused by intoxication," and the record contained "ample evidence" that the employee's intoxication proximately caused his death).

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[3] We note that the conclusion that “[h]owever, even if it had been concluded that intoxication was a proximate cause of plaintiff’s accident, at least a portion of the alcohol consumed by the plaintiff in the hours prior to his injury was supplied by an agent of defendant-employer acting in his supervisory capacity” was not in the original opinion and award drafted by Chief Deputy Commissioner Shuford. This equivocal statement was added by the full Commission as an amendment to the findings of fact and conclusions of law when it adopted as its own the original opinion and award of the Chief Deputy. This statement, if it be considered as a finding of fact or conclusion of law, is so equivocal as to be of no legal significance. Clearly, there is no necessity for the Commission to reach the issue of whether “the intoxicant” was provided by the employer until it has decided that the employee was intoxicated, and that the accident was proximately caused by his intoxication. We hold there is no competent, credible evidence in this record to raise an issue as to whether the employer provided “the intoxicant.”

G.S. 97-12 is an integral part of our Workers’ Compensation Act and evidences the Legislature’s intention to relieve an employer of the obligation to pay compensation to an employee when the accident giving rise to the employee’s injuries is proximately caused by his intoxication. The oft-quoted rule that the Act should be liberally construed, *see e.g., Johnson v. Hosiery Company*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930), does not license either the Commission or the courts to disregard the manifest intention of the Legislature in enacting G.S. 97-12.

For the reasons set out herein, the order requiring the defendants to pay compensation to the plaintiff is vacated, and the cause is remanded to the Industrial Commission for findings based on the present record and proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges WEBB and HILL concur.

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**PATRICIA BENTHALL WARMACK AND CHARLES PATRICK WARMACK v.
MANNING P. COOKE**

No. 846SC126

(Filed 4 December 1984)

1. Easements § 6.1— easements by prescription over two farm paths—separate uses required

Where an action seeks to establish by prescription easements for ingress and egress to plaintiffs' farm over two paths in separate locations, separate uses are required to establish title in either or both.

2. Easements § 6.1— easement by prescription—farm path—evidence sufficient

In an action to establish easements by prescription, plaintiffs' evidence of a hostile use was sufficient to go to the jury where plaintiffs' evidence showed that plaintiffs and defendant owned adjoining tracts acquired from a common ancestor; that plaintiffs' chain of title went back to 1943; that plaintiffs had used or leased their land and the path over defendant's land continuously for various farming or logging operations, with the exception of a lease to a hunting club from 1969 to 1975; and that plaintiffs, their ancestors, and lessees had engaged in maintenance of the path.

3. Easements § 6.1— easement by prescription—public use by neighbors—claim of exclusive possession not defeated

In an action to establish easements by prescription, evidence of public use consisting of neighbors using the paths from time to time in passing to and from their own property will not defeat the claim of hostile and exclusive use. A claim of adverse possession does not require that all persons be barred at all times from transversing the property; rather, the hostile acts required are those which tend to give the owner of the servient estate notice that the use is being made under a claim of right and which repel the inference of permissive use.

4. Easements § 6.1— easement by prescription—continuous use not interrupted

In an action to establish easements by prescription, plaintiffs' continuous use was not interrupted by a period when the same person leased plaintiffs' and defendant's tracts because plaintiffs retained and used a portion of their tract, and continued to use the paths in question. The erection of an electric fence across the path did not interrupt plaintiffs' possession because a hook placed on the wire where it crossed the path allowed passage.

5. Easements § 6.1— easement by prescription—evidence properly admitted

In an action to establish easements by prescription, the trial judge did not err in admitting evidence of kinship between the parties for consideration by the jury and in denying a requested instruction on the relationship, did not err in admitting evidence of the use of the paths prior to defendant's acquisition of his property when the jury was instructed to consider evidence of adverse possession only from the time he acquired his property, and did not err in

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refusing to charge the jury that the proper period for consideration for a prescriptive right was the twenty years next preceding the claim.

APPEAL by defendant from *Brown, Judge*. Judgment entered 15 September 1983 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 25 October 1984.

This action arises out of plaintiffs' use of two farm paths located on defendant's farms and leading to plaintiffs' farm. Plaintiffs institute this action to establish their right to use the roadways by virtue of an easement by prescription and to enjoin defendant from interfering with that right.

Plaintiffs alleged in their complaint that "[p]laintiffs and their predecessors in title have continuously used such roads for ingress and egress under an absolute claim of right, without the consent or permission of the defendants." Plaintiffs sought a temporary and mandatory injunction enjoining defendant from interfering with plaintiffs' access to their lands, together with actual and punitive damages. The defendant answered denying plaintiffs' allegations and seeking an injunction permanently enjoining plaintiffs from use of the paths, together with a prayer for damages arising out of the unauthorized use.

At trial the evidence tended to establish the following. Plaintiff Patricia Benthall Warmack and defendant Manning P. Cooke are first cousins, both being the grandchildren of W. P. Benthall. Plaintiff Patricia Benthall Warmack owns and operates a farm in Northampton County. Defendant owns two farms lying west of and adjoining her land. Patricia Benthall Warmack acquired her property by deed of gift from her father in 1973. Her son, plaintiff Charles Patrick Warmack, rents a portion of the property from her. Patricia Benthall Warmack's father, Wilton P. Benthall, acquired title from his father, W. P. Benthall, in October 1943.

At that time, October 1943, W. P. Benthall owned the lands now held by defendant. After W. P. Benthall's death in 1944, defendant's mother owned the property as life tenant, and defendant acquired the lands in two transactions occurring in 1949 and 1952.

By letter dated 6 April 1981 defendant notified plaintiffs that they would no longer be permitted to use the farm paths. Defend-

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ant subsequently installed large drainage pipes across the paths, blocking them.

Defendant moved for a directed verdict, which was denied. At the close of the evidence, the issues were submitted to the jury and answered as follows:

1. Is the Plaintiff, Patricia Benthall Warmack, the owner of an easement of right-of-way over the farm path across the property of the Defendant, Manning P. Cooke, as such path extends to the northwest corner of Plaintiff, Patricia Benthall Warmack's property . . . ?

ANSWER: No.

2. Is the Plaintiff, Patricia Benthall Warmack, the owner of an easement of right-of-way over the farm path across the property of the Defendant, Manning P. Cooke, as such path extends to the western line of Plaintiff, Patricia Benthall Warmack's property . . . ?

ANSWER: Yes.

Defendant's motion under Rule 50(b) of the North Carolina Rules of Civil Procedure for judgment notwithstanding the verdict was denied, and he appealed. Plaintiffs cross-appealed. Other facts necessary to a resolution of the issues presented herein will be set out below.

Spruill, Lane, Carlton, McCotter & Jolly by Ernie K. Murray for plaintiff appellees.

Moore, Van Allen and Allen by C. Steven Mason and Charles J. Vaughan for defendant appellant.

HILL, Judge.

Plaintiff, pursuant to Rule 28(c) of the North Carolina Rules of Appellate Procedure, has submitted an alternative statement of the questions presented, expanding to seven, rather than four, the areas of concern raised in this appeal. We believe this case can be decided on the disposition of the issues as hereinafter set out.

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[1] The lawsuit seeks to establish by prescription two separate easements for ingress and egress to plaintiffs' farm. Because of separate locations of the two paths, separate uses must be provided to establish a prescriptive title in either or both. While it would have been better to sever the action, trying each claim separately, neither party objected to trying them together. Defendant contends plaintiffs failed to establish a substantial identity of the easement claimed because they sought easements in two paths under a single servient estate. However, the jury awarded an easement in one path only; thus, defendant's contention becomes moot.

[2] Defendant next contends the trial court erred in denying his motion for a directed verdict and judgment notwithstanding the verdict on the evidence of this case. Defendants are entitled to a directed verdict and, thus, a judgment notwithstanding the verdict only if the evidence when considered in the light most favorable to plaintiffs, fails to show the existence of each and every element required to establish an easement by prescription. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Plaintiffs on such a motion are entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in their favor. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981); *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978).

In order to prevail in an action to establish an easement by prescription, plaintiffs must prove the following elements by the greater weight of the evidence:

- (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Potts v. Burnette, *supra* at 666, 273 S.E. 2d at 287-88, citing *Dickinson v. Pate*, *supra* at 580-81, 201 S.E. 2d at 900-01. Defendant contends the acts committed by plaintiffs to be insufficient evidence of a hostile character of their use of the paths to create an issue of fact for the jury.

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A hostile use has been defined as "a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E. 2d 873, 875 (1966). The term adverse use or possession implies a use or possession that is not only under a claim of right, but that is open and of such character that the true owner may have notice of the claim; and this may be proven by circumstances as well as by direct evidence. *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912).

Plaintiffs' evidence showed substantially the following: Upon purchasing the Bishop and Powell land, William P. Benthall, Jr. immediately began farming the property. From 1943 to 1957 he farmed the property himself. From 1957 to 1963 he farmed the property in partnership with Henry Bennett. Beginning in 1963, he rented to Henry Bennett the right to raise row crops on a portion of the property. He retained, however, the right to pasture cattle on some of the property throughout this period and on into the late 1960's. Plaintiff Patricia Benthall Warmack's husband logged the property using the same path for purposes of ingress and egress in 1967. Every year from the time that Benthall, Jr. stopped farming the Bishop and Powell tract until Charles Patrick Warmack, grandson of Benthall, Jr., began farming it, the Benthalls kept a large garden on the property and used the path in order to get to the property to tend the garden. From 1969 until about 1975, the hunting rights to the Bishop and Powell tract were leased to Robert Earl Fields and Robert Gary Fields and their hunting club. W. P. Benthall, Jr. showed them the path in question and indicated to them that this was their means of ingress and egress into the property in order to exercise and enjoy the hunting rights they had leased. In 1975, Charles Patrick Warmack began preparing the pasture areas for a cattle operation which he began in 1976. From 1976 to 1979 he operated a cattle farming operation, and in 1979 he took over the row crops raised on the Bishop and Powell land. All the farming operations required regular access into and out of the Bishop and Powell tract, and the testimony of all witnesses was that the path in question, described as the path by the red barn, was the means used for ingress and egress to the property. Plaintiff Patricia Benthall Warmack testified that she had a right to use the path. W. P. Benthall, Jr. and Charles Patrick Warmack both engaged in main-

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tenance of the path, as well as Henry Bennett while he was a tenant.

It is well settled in North Carolina that the user of a way or path over the lands of another is presumed to be permissive. *Potts v. Burnette*, *supra* at 667, 273 S.E. 2d at 288. In *Potts*, our Supreme Court refused to adopt the rule, obtaining in a majority of jurisdictions, that the user is presumed to be adverse. Thus, in order for plaintiffs to have succeeded in their claim, they must have shown sufficient evidence of the hostile character of their use to have created an issue of fact for the jury. This we believe plaintiffs have done from the foregoing evidence. Although there is some evidence that Charles Patrick Warmack sought permission from defendant to bar others from coming on the premises while deer hunting, and the defendant refused, it is noted that he was a tenant only at the time, and this single act of acquiescence by him is insufficient to defeat the claim of hostility otherwise shown by plaintiffs' evidence.

[3] Defendant further contends that plaintiffs by their own witnesses have shown that the paths have been used by the public at large, thus defeating the hostile and exclusive claim necessary for adverse possession, citing *Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 304 S.E. 2d 259 (1983). In that case, plaintiff failed to show any claim of right or hostile use for the required twenty-year period. Furthermore, witnesses testified that a portion of the disputed right of way was used by the public as a driveway connecting two streets for years and was closed in 1967. The area in dispute had been used for entrance for a parking lot and a drive-in bank window. Such public use is remote from the evidence in the case *sub judice* of plaintiffs' neighbors from time to time using the paths in a neighborly fashion in passing to and from their own property and not plaintiffs' lands. We do not believe that persons claiming an area adversely and hostile are compelled to bar all other persons at all times from traversing the property in dispute. If such were the case, neighborly relationships would be destroyed, and the conduct of business on the premises would cease. Rather, we believe that acts of hostility should be manifested by such acts which tend to give notice to the owner of the servient estate that the use is being made under a claim of right and which repel the permissive inference that the use is with the owner's consent. *Dickinson v. Pake*, *supra* at

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580-81, 201 S.E. 2d at 900. Plaintiffs' evidence set forth the element of hostility required to overcome the inference of permissiveness.

[4] Defendant in two arguments contends that plaintiffs have failed to prove that the use has been continuous and uninterrupted for a period of at least twenty years. First, defendant argues that the farm tenancy agreement between W. P. Benthall as owner and Henry Bennett as tenant running from 1953 until 1979 was defeated by Bennett's farm tenancy agreement with defendant or his predecessors in title between 1967 and 1982. Defendant argues that during the period when Bennett's leases overlapped, possession of the dominant and servient estates were under the same party, and that the time for acquiring an easement does not run or is tolled during such period. See 28 C.J.S., *Easements* § 14(g), p. 658; Webster's Real Estate Law in North Carolina § 321 (2nd ed. 1971). Defendant contends that since possession was vested in Bennett during this period, defendant was unable to resist plaintiffs' alleged adverse use, because any right of action against such use would have belonged to Mr. Bennett. "[I]f a landlord is unable in law to resist an alleged adverse claim, a right by prescription cannot be acquired against him while the property is in the possession of the tenant." 25 Am. Jur. 2d, *Easements and Licenses* § 40, p. 454. However, the record reflects that Bennett leased only a portion of plaintiffs' lands for row crops during the period, and plaintiffs retained a portion of the farm for cattle raising at the time. During the periods of the lease plaintiffs continued to use the paths in connection with his cattle farming. Defendant has shown no cases for tolling the statute under North Carolina law, and we decline to agree with his argument.

Second, defendant argues that the erection of an electric fence across the path destroyed the continuous use by plaintiffs, citing *Ingraham v. Hough*, 46 N.C. 39 (1853). That case is distinguishable in that not only was a gate erected but the path was plowed, showing without question that an interruption was intended. The record reveals in the case *sub judice* that a hook was placed on the wire where it crossed the path, which could be disengaged to permit passage beyond. We believe the presence of the wire hook which could be disengaged indicates that passage was still anticipated along the way. Defendant has failed to show

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any tolling of the statute to defeat plaintiffs' contention of continuous possession.

[5] Defendant next contends in several assignments of error that the trial judge erred in allowing certain evidence and in his charge to the jury. First, defendant argues the judge erred in refusing to instruct the jury of the relevancy of defendant's close familial relationship to plaintiffs, i.e., first cousins. The trial judge was correct in admitting evidence of the kinship between the parties for consideration by the jury and nothing more. In *Ingraham v. Hough*, 46 N.C. 39 (1853), the Supreme Court held that the fact that the parties were brothers was some evidence, though slight, which could be considered by the jury in connection with other facts. *Id.* at 42. The trial judge correctly refused to make the charge requested.

Secondly, we find no prejudicial error in the trial judge accepting evidence over defendant's objection regarding use of the paths prior to 1949. The judge charged the jury to consider evidence of adverse possession only from 1949 forward. Defendant has failed to demonstrate prejudicial error.

Third, defendant requested the trial judge to charge the jury that the proper period for consideration for a prescriptive right was twenty years next preceding the claim. The trial judge refused to so charge, and defendant excepted. He cites no authority for his position, and we have found none. A careful reading of the guidelines in *Dickinson v. Pake*, *supra*, and other related cases, finds no such requirement. We believe that title vests in the claimant upon twenty years of continuous and uninterrupted possession, all other requirements having been met, and the bringing of suit at any time thereafter simply gives record title to the property or interest in property acquired.

We have examined defendant's remaining arguments and find them without merit. Because of our disposition of this case, we conclude plaintiffs' cross-appeal becomes moot.

In conclusion we find the trial court did not err in denying defendant's motion for a directed verdict and subsequently his motion for judgment notwithstanding the verdict. All of the elements of the cause of action were sufficiently established in the

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record for consideration by the jury. The jury has spoken. The judgment of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur.

LESTER SAWYER v. WILLIAM R. CARTER

No. 8429SC712

(Filed 4 December 1984)

1. Negligence § 53.8— invitee's injury during robbery of store—action against store owner

Plaintiff could properly bring an action against the owner of a convenience store for injuries sustained during a robbery at the store.

2. Negligence § 56— robbery at store—injuries to invitee—action against store owner—evidence of foreseeability of criminal act

In an action against a store owner for injuries sustained by business invitees resulting from intentional criminal acts of third persons, evidence pertaining to the foreseeability of the criminal attack will not be limited to prior crimes occurring on the premises.

3. Negligence § 57.11— robbery at store—injuries to invitee—action against store owner—insufficient evidence of foreseeability

In an action against the owner of a convenience store to recover for injuries received when plaintiff invitee was shot by a robber at the store, plaintiff's forecast of evidence of a single robbery at the convenience store five years earlier and of occasional robberies of other convenience stores and other businesses in the area over an extended period of time was insufficient to raise a triable issue concerning the foreseeability of the robbery.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 27 February 1984 in Superior Court, HENDERSON County. Heard in the Court of Appeals 25 October 1984.

On 5 January 1980, plaintiff entered "The Back Door Store," a convenience store owned by defendant. The store manager, an acquaintance of the plaintiff, requested plaintiff to attend to the front premises for a few minutes. Plaintiff agreed, and almost immediately after the manager went to the back of the store, two armed men entered, and in the course of robbing the store, shot

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and wounded plaintiff. Plaintiff brought this action against the store owner to recover damages for injuries sustained during the robbery. Defendant filed an answer and subsequently moved for summary judgment. From the order granting defendant summary judgment, plaintiff appeals.

Herman L. Taylor, for plaintiff-appellant.

Roberts, Cogburn, McClure & Williams, by Isaac N. Northup, Jr., for defendant-appellee.

VAUGHN, Chief Judge.

Plaintiff argues that the trial court erred in granting summary judgment in favor of defendant, owner of the convenience store at which plaintiff was injured during a robbery. We conclude summary judgment was properly entered and therefore affirm.

[1] North Carolina has recognized that a landowner may be liable for injuries sustained by business invitees which are the result of intentional criminal acts of third persons. The seminal case in this area is *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981). The defendants in *Foster* were the owners of Hanes Mall, in whose parking lot the plaintiff was attacked. Our Supreme Court held, *inter alia*, that plaintiff had stated a claim for relief. Relying on *Foster*, subsequent cases have held that a cause of action may exist against a motel owner, *Urbano v. Days Inn*, 58 N.C. App. 795, 295 S.E. 2d 240 (1982) (assault again occurring in parking lot), and against a college or university. *Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 309 S.E. 2d 701 (1983). We see no reason to forbid a cause of action against an owner of a "convenience" or "package" store.

Once a cause of action sufficient to withstand dismissal is stated, whether a duty to protect business invitees against criminal acts of third persons will be imposed upon a particular landowner in a particular case depends upon the foreseeability of criminal activity. Foreseeability as the determinant of the extent of a landowner's duty to protect was enunciated in *Foster*, and followed in *Urbano* and *North Carolina Wesleyan*, all *supra*. By adopting foreseeability as the standard for liability in these cases, North Carolina applies the majority rule. Annot., 72 A.L.R. 3d

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1269 (1976). Therefore, in evaluating the propriety of summary judgment in this case, we must determine whether the pleadings, together with the supporting materials, raise a triable issue of fact concerning the foreseeability of the robbery that resulted in plaintiff's injuries. *See Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981) (procedure for summary judgment allows forecast of proof in order to determine whether jury trial is necessary); *Goode v. Tait, Inc.*, 36 N.C. App. 268, 243 S.E. 2d 404, review denied, 295 N.C. 465, 246 S.E. 2d 215 (1978) (moving party must show there can be no other evidence from which a jury can reach a different conclusion as to a material fact).

Plaintiff submitted affidavits in opposition to defendant's motion for summary judgment. The information contained in these affidavits relating to foreseeability of the robbery is as follows: James Sherman stated that he has owned and operated five to seven convenience stores in the Hendersonville area, and that two robberies have occurred at his stores. Both of these robberies occurred in 1974, when a clerk going to make a night deposit was attacked by robbers outside the store. He further stated that almost all small stores open after dark in the Hendersonville area have been robbed at least once since 1974.

An employee of the Hendersonville Police Department listed robberies occurring in the Hendersonville area since 13 December 1976 of which he had a "personal recollection." Once the robberies occurring after the date of the robbery in question are eliminated from our consideration, as they do not bear upon the question of foreseeability, there remain eight robberies, three at convenience stores, two at banks, and one each at a drug store, a book store, and a taxi stand.

Another police department employee listed in her affidavit 100 robberies that occurred in the Hendersonville area between October 1973 and September 1983. Forty-five of these occurred after 5 January 1980, and again, we do not consider them on the issue of foreseeability. Of the remaining 55 robberies, 35 were robberies against individuals, and only ten of the remaining 20 robberies at business establishments took place at convenience-type stores.

Defendant submitted two affidavits, his own and that of the store manager. Defendant stated in his affidavit that he had

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rented the premises for about one and a half years prior to the robbery, and that to his knowledge, the store has no history of armed robberies. The store manager at the time of the incident testified he had held that position for about one year before the incident. He stated that in the five years prior to 5 January 1980, he knows of only one robbery of The Back Door Store, that having taken place approximately five years before the incident.

[2] We have summarized the contents of the affidavits because they are the principal material on which the summary judgment was based. We note that the plaintiff relied heavily, indeed almost exclusively, on evidence of robberies that occurred in the Hendersonville area generally and not on the actual premises of The Back Door Store in support of its theory that the attack was foreseeable. Thus, in order to properly evaluate the ultimate issue of the propriety of the summary judgment, we must first address the question of whether evidence of criminal activity not occurring on the premises owned by defendant may be properly considered.

Although we have found no North Carolina case actually discussing this question, we note that a landowner's liability for criminal acts of a third party has been predicated, at least partly, on evidence of the general character of the neighborhood. In *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E. 2d 855, review denied, 301 N.C. 239, 283 S.E. 2d 136 (1980), defendant was held liable for injuries sustained by plaintiff when she was sexually assaulted in defendant's bus station. Relying on the rule that all relevant evidence is admissible unless excluded by some specific rule, this Court held that evidence of the neighborhood surrounding the bus station and type of individuals frequenting the area was admissible to show defendant's knowledge of the need for insuring adequate protection of its passengers. *Id.* at 684-5, 268 S.E. 2d at 859-60. But irrelevant evidence, even of crimes occurring on the premises, may be excluded. See *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 306 S.E. 2d 199 (1983) (excluding evidence of unrelated prior crimes on premises, and of rape occurring at another apartment complex managed by defendants).

Although evidence of conditions in the surrounding area appears to be admissible in North Carolina on the question of fore-

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seeability, we note that the *Foster* case and its progeny, although they did not enunciate a rule of "premises liability," depended chiefly on evidence of criminal activity occurring on the premises to establish the foreseeability of the crime underlying the lawsuit and hence liability of the landowner. *E.g.*, *Urbano v. Days Inn, supra* (42 criminal incidents in parking lot in three years prior to attack in parking lot; 12 in three and a half months prior); *Foster v. Winston-Salem Joint Venture, supra* (31 incidents in parking lot in year prior to assault in parking lot).

In attempting to fashion an evidentiary rule in these situations, we have looked to other jurisdictions for guidance, only to find a dramatic variance in willingness to consider evidence of criminal activity not occurring on the premises. Some courts limit evidence exclusively to acts occurring on the landowner's premises, on the theory that conditions in the vicinity are irrelevant. *See, e.g.*, *Scott v. Watson*, 278 Md. 160, 169, 359 A. 2d 548, 554 (1976) (duty of landlord to exercise reasonable care for tenants' safety "arises primarily from criminal activities existing on the landlord's premises, and not from knowledge of general criminal activities in the neighborhood," observing that landlords can only affect risks within their own premises); *Cornpropst v. Sloan*, 528 S.W. 2d 188, 197 (Tenn. 1975).

At the other end of the spectrum are cases that take a more inclusive approach, considering the crime rate in the surrounding neighborhood, as well as the location and character of the business enterprise. In a case involving an assault in a lower lobby of a motel, the Missouri Supreme Court reasoned:

Any suggestion that crime is not foreseeable is particularly inappropriate when a downtown metropolitan area is involved, especially when the case involves a hotel. . . . The operator of a hotel to which the public has easy access . . . should not be heard to say that he [or she] had no inkling that crime of the kind here involved might occur on . . . [the] premises simply because there had been none in the past.

Virginia D. v. Madesco Inv. Corp., 648 S.W. 2d 881, 887 (Mo. 1983). *See also Early v. N.L.V. Casino Corp.*, 100 Nev. 36, 678 P. 2d 683 (1984) (court stated that evidence relating to past crimes on the premises and to the location and character of defendant's busi-

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ness, a gambling casino, could provide the requisite foreseeability).

But even in jurisdictions endorsing a liberal approach to the admissibility of evidence, courts are reluctant to impose liability absent evidence of prior criminal activity on the premises. For example, in *Uihlein v. Albertson's, Inc.*, 282 Or. 631, 580 P. 2d 1014 (1978), although plaintiff produced evidence that defendant's supermarket was located in a high-crime area, no evidence was presented that any crime other than shoplifting had ever taken place in the store itself. The Supreme Court of Oregon reasoned that this evidence did not support the foreseeability of an assault and robbery as a matter of law and affirmed a summary judgment in defendant's favor. *Accord, Genovay v. Fox*, 143 A. 2d 229, 237, 50 N.J. Super. 538, 555 (1958), *rev'd on other grounds*, 149 A. 2d 212, 29 N.J. 436 (1959) (no jury question of owner's duty to secure patrons from bodily harm; "[t]he evidence is that this establishment had never been subjected to armed robbery before and there is therefore no particular significance in defendant's knowledge that there was a general increase in armed criminality in the community, at least where not shown to have risen to an extraordinary degree").

One concept that emerges from the disharmony of the foregoing cases is that evidence of similar prior criminal activity committed on the premises is the most strongly probative type of evidence on the question of foreseeability. Although we agree with this principle, we see no need to adopt a brightline rule limiting evidence exclusively to that of prior crimes on the premises. Rather, we recite the basic rule that all relevant evidence is admissible unless excluded by some specific rule, *see* G.S. 8C-1, Rule 402; 1 Stansbury's N.C. Evidence § 77, n. 9 (2d Rev. ed. 1982), and state directly what was implied in *Wesley v. Greyhound*, *supra*, that evidence pertaining to the foreseeability of criminal attack shall not be limited to prior criminal acts occurring on the premises. We disagree that all other evidence is automatically irrelevant to the question of foreseeability.

[3] We now return our attention to the central issue of the summary judgment. We have reviewed the record, and although we have not confined our review to evidence of prior crimes at The Back Door Store, we conclude that the trial court's entry of sum-

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mary judgment was proper and should not be disturbed. The forecast of the evidence shows that the plaintiff will not be able to produce substantial proof at trial which would allow the issue of foreseeability to be resolved in his favor. See *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E. 2d 281, 283 (1979). The evidence resembles that of *Brown v. N. C. Wesleyan College*, *supra*, where this Court, in affirming a summary judgment for the defendant, concluded that the "scattered incidence" of crime in more than a decade before the abduction and murder of a student did not raise a triable issue as to reasonable foreseeability: "The forecast of evidence does not show a repeated course of criminal activity which would have imposed a duty upon defendant to keep its campus safe." *Id.* at 583-4, 309 S.E. 2d at 703.

Likewise is the evidence of a single robbery at The Back Door Store five years prior to the robbery in question, and evidence of occasional robberies of convenience-type stores and other business establishments over an extended period of time at unspecified locations in the Hendersonville area insufficient to raise a triable issue of fact. We doubt there exists a community in this State which is entirely crime-free. In the broadest sense, all crimes anywhere are "foreseeable." To impose a blanket duty on all merchants to afford protection to their patrons would be a result not intended by our courts and not condoned by public policy. Discharging such a duty would undoubtedly be inconvenient and expensive, and to impose a duty absent true foreseeability of criminal activity in a particular store would be grossly unfair. See dissenting opinion of Carlton, Justice, in *Foster*, *supra*. The forecast of evidence in this case does not support a triable issue of fact on the question of reasonable foreseeability.

Affirmed.

Judges BRASWELL and EAGLES concur.

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STATE OF NORTH CAROLINA v. JAMES ROBERT (DICK) SOUTHERN

No. 8317SC1291

(Filed 4 December 1984)

1. Criminal Law § 138—aggravating circumstances—prior convictions—consideration of prayer for judgment continued—improper

The trial court should not have considered two convictions where prayer for judgment was continued in finding the aggravating factor of prior convictions and sentencing defendant to a greater than presumptive term. No judgment is entered and no appeal is possible where prayer for judgment is continued, and such convictions therefore do not meet the statutory definition of prior convictions. G.S. 15A-1340.2(4), G.S. 15A-1340.4(a)(1)(o).

2. Criminal Law § 112.6—jury instruction—misstatement of law—subsequent correct statement—no plain error

There was no plain error where the trial judge misstated the law by instructing the jury that defendant did not act in self-defense "if he inflicted serious bodily harm upon the deceased," but stated the law correctly in the conclusion to the initial instruction and in the final summary by saying that defendant did not act in self-defense if he was "the aggressor with the intent to kill or inflict serious bodily harm." App. Rule 10(b)(2).

3. Criminal Law § 122.1—reinstruction on malice at jury's request—no additional instruction on self-defense—no error

There was no abuse of discretion in a trial judge's decision not to reinstruct the jury on self-defense because the jury had requested additional instructions only on malice and additional instructions on self-defense might have unduly influenced them.

4. Criminal Law §§ 73.4, 76.6—statements by defendant heard by investigating officer—voluntary—issue of reliability dropped

There was no error in admitting statements made by defendant where the evidence at a *voir dire* showed that defendant was asked what happened by the investigating officer; that he told the officer to talk to the victim, who was leaning against an automobile; that defendant was talking with others at the other end of the station wagon while the officer questioned the victim; that defendant stated that he had knocked hell out of the victim; and that the statements were made within 15 minutes of his striking the victim. Although defendant originally raised the issue of reliability, he effectively dropped it by accepting the judge's suggestion that his objection involved voluntariness and by declining to make additional claims or arguments when invited to do so by the judge.

APPEAL by defendant from *Beaty, Judge*. Judgment entered 18 January 1983 in Superior Court, CASWELL County. Heard in the Court of Appeals 18 September 1984.

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The State's evidence showed:

The defendant, Dick Southern, spent much of 30 September 1982 working on an automobile, which belonged to his friend Milton Lee Long. Long and another friend, William Thomas Williams, were with the defendant late in the afternoon of the 30th, as the defendant finished repairing Long's car. The three of them drank part of a bottle of gin. The defendant became involved in an argument with Mattie Farris, who lived in his house, over the keys to one of his cars. Defendant picked up a tire iron and approached Mattie Farris with it. Farris's daughter, Vivian, stepped between defendant and her mother, and told defendant not to hit her mother. Milton Long then approached defendant and began talking with him, and raised his arms in the air and waved them. Defendant told Long that he would hit Long with the tire iron, saying "Don't you believe I'll hit you?" Defendant then hit Long on the left side of the head, and Long fell to the ground. Defendant did not assist him.

The police and an ambulance were called, and by the time they arrived Long had regained consciousness and stood upright, propped against one of the cars. When asked what happened, he replied that he fell off a truck and struck his head. Defendant helped to persuade Long to go to a hospital. There, however, Long refused treatment. Defendant picked Long up from the hospital and took him home. Long was found dead the next morning at his home, the cause of death being the head injury received the night before.

The evidence presented by the defense showed, in pertinent part:

Mattie Farris and defendant had no argument over the use of defendant's car.

While defendant was working on Long's automobile, Long, who was intoxicated, jumped in the car and bumped it several times. The auto was on jacks and defendant was working under it. He told Long to stay off the car so it would not fall on him. Long continued to jump in the car, and defendant came out from under it and told Long that he had had too much to drink, and to go down the road and cool off. Long then pulled a knife, and approached defendant, swinging it at him. Defendant moved back-

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wards into a tree, and then picked up a tire iron. He then moved backwards until he reached his car, where Long swung at Southern and cut its vinyl roof. Long continued to swing with the knife until defendant "tapped" him with the tire iron. Defendant claims that he did not help Long immediately after he had fallen because he did not know what to do.

Defendant was tried before a jury and was convicted of voluntary manslaughter on 17 January 1983. He was sentenced to eight years in prison. From this judgment he appeals.

Attorney General Rufus L. Edmisten, by Associate Attorney Michael Smith, for the State.

George B. Daniel, and Ronald M. Price, by Ronald M. Price, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in improperly sentencing him, in misstating the law when instructing the jury on self-defense, in failing to reinstruct the jury on self-defense, and in admitting evidence of defendant's statements over objection and without a proper voir dire. We find no error in the guilt phase of the trial. We find, however, that in the sentencing phase the trial court did err, and that defendant is therefore entitled to a new sentencing hearing.

[1] Defendant contends that the trial court's reliance on prior convictions where prayer for judgment had been continued to find an aggravating circumstance pursuant to G.S. 15A-1340.4(a)(1)(o) amounted to a denial of due process and a fair sentencing hearing. We agree.

The trial court found the statutory element of aggravation under G.S. 15A-1340.4(a)(1)(o): "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement." The definition of "prior conviction" appears in G.S. 15A-1340.2(4):

A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, and judgment has been entered

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thereon and the time for appeal has expired, or the conviction has been finally upheld on direct appeal. (Emphasis added.)

Thus, an offense is a "prior conviction" under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. When an accused is convicted with prayer for judgment continued, no judgment is entered, *see State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966), and no appeal is possible (until judgment is entered). Such a conviction therefore may not support a finding of an aggravating circumstance under G.S. 15A-1340.4 (a)(1)(o).

In the present case, the trial judge sentenced defendant to eight years in prison, rather than to the presumptive six years. He found one statutory aggravating circumstance, pursuant to G.S. 15A-1340.4(a)(1)(o), and no mitigating circumstances. His finding of the aggravating circumstance was based on two convictions where prayer for judgment was continued, a charge where the State entered a nolle prosequi (where there was no trial or conviction), and a conviction for a non-tax paid liquor violation, a non-violent offense for which defendant was placed on probation. Had the judge not considered the convictions where prayer for judgment was continued, he would have been left with the charge nolle prosequi and the non-tax paid liquor conviction. Further, had the judge considered only these two offenses (and, we note, the charge nolle prosequi involves no conviction), the outcome of the sentencing hearing might have been materially altered. The trial court's consideration of the two offenses where prayer for judgment was continued was improper and in the circumstances of this case denied the defendant a fair sentencing hearing. A new sentencing hearing is in order.

[2] The defendant contends further that the trial court erred in its instructions to the jury on the defendant's entitlement to a plea of self-defense. Defense counsel failed to object at trial to the court's instructions, despite ample opportunity to do so, and his claims now are therefore barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. The defendant urges that we order a new trial, Rule 10(b)(2) notwithstanding, on the basis of the "plain error" doctrine, recently adopted into North Caro-

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lina law. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Defendant argues that the court's instructions so confused the jury on the legal elements that must be proved by the State to defeat his claim of self-defense as to prejudice him in making his case for self-defense. While we agree that there is some potential for confusion in the Pattern Jury Instructions, on which the judge relied, we believe that he so clarified their meaning that no "plain error" occurred.

The trial judge's instructions read in pertinent part:

Further, the defendant is not entitled to the benefit of self-defense if he was the aggressor with the intent to kill or *if he inflicted serious bodily harm upon the deceased.*

EXCEPTION NO. 19 (instruction should be deleted after word "or").

Therefore, in order for you to find the defendant guilty of murder in the second-degree, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense; or failing in this, the State must prove that the defendant, and prove beyond a reasonable doubt, that the defendant was the aggressor with the intent to kill *or that he inflicted serious bodily injury upon the deceased.*

If the State fails to prove either that the defendant did not act in self-defense or *was the aggressor with the intent to kill or inflict serious bodily harm*, you may not convict the defendant of second-degree murder; but you may convict the defendant of voluntary manslaughter if the State proves that the defendant was simply the aggressor without murderous intent in bringing on the fight in which the deceased was killed. . . . (Emphasis added.)

In his final mandate to the jury, the judge stated:

Third, the State must prove to you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was *the aggressor in bringing on the fight with the intent to kill or inflict serious bodily harm upon the deceased*, Milton Lee Long. (Emphasis added.)

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While the judge originally misstated the law by saying that the defendant did not act in self-defense "if he inflicted serious bodily harm upon the deceased" (this comes from the Pattern Jury Instructions), he stated the law correctly in concluding his initial instruction and in making his final summary of law for the jury. In both these latter instances, he properly stated that the defendant did not act in self-defense if he was "the aggressor with the intent to kill or inflict serious bodily harm." After considering the entire charge, we believe that the trial judge left the jury with an accurate view of the law of self-defense. Even if a proper objection had been made, the judge's errors would have been questionable grounds for reversal. *See State v. McCall*, 31 N.C. App. 543, 546-47, 230 S.E. 2d 195, 197-98 (1976). Moreover, our review of the entire record does not persuade us that the judge's misstatements, even if they did create some confusion, were so grave, and so manifestly unjust, that they were "plain error," causing a "probable impact" on the jury's finding that the defendant was guilty of voluntary manslaughter. *See Odom*, 307 N.C. at 660.

[3] We reject defendant's third contention that the trial judge should have reinstructed the jury on self-defense, once he had reinstructed on malice. Whether a judge reinstructs the jury as requested by counsel is a matter in his discretion, G.S. 15A-1234. In this case, the judge's decision not to reinstruct on self-defense, because the jury requested only additional instructions on malice and because his giving additional instructions on self-defense might unduly influence them, was no abuse of discretion.

[4] We also reject defendant's contentions that a proper voir dire to determine the voluntariness of defendant's statements was not held and that defendant's statements were involuntary and inadmissible. The record indicates that after a police officer, Maynard Smith, described at trial the circumstances in which he overheard the defendant make incriminating statements, the defense counsel objected. The trial judge immediately cleared the courtroom, and the defense counsel then explained his objection. He expressed concern about the reliability of the testimony, in light of the police officer's physical distance from the defendant and the fact that several people were talking at once. The court then asked, "Are you saying that it was not a voluntary statement?" The defense counsel replied, "Yes, sir." The defense

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counsel apparently dropped his objection concerning reliability when the judge suggested the problem of voluntariness. The judge then heard arguments of opposing counsel on the voluntariness of the defendant's statements. The judge gave the defense counsel opportunity to make additional arguments or to raise further questions on the admissibility of the evidence, but he declined. Although additional evidence was not offered during the hearing, we find that it was essentially a proper voir dire, in that the judge cleared the courtroom and heard arguments of opposing counsel, based on the police officer's testimony prior to the objection. See *State v. Fox*, 277 N.C. 1, 24, 175 S.E. 2d 561, 575 (1970).

The findings by the trial court after the voir dire, that the defendant's statements were voluntary, "are conclusive and binding upon appellate courts if supported by competent evidence in the record . . . even though the evidence is conflicting." *State v. Corley*, 310 N.C. 40, 52, 311 S.E. 2d 540, 547 (1984). Our task on review is to determine whether the "totality of the circumstances" provide competent evidence that the defendant's statements were voluntary. *Corley*, 310 N.C. at 47-48. We find that they do.

The record shows that when the police arrived at the defendant's residence, they found a group of people standing in the yard. Officer Smith walked up to defendant and asked him what happened. He replied that Smith should talk to Milton Long, who was leaning against an automobile. Smith asked Long three times what had happened, and he replied each time that he had fallen off a truck. Smith testified that while he was talking to Long, the defendant, who was at the other end of the station wagon from Long, talking with other people around him, stated, among other things, that he had knocked the hell out of Milton Long. The defendant was not in the custody of the police. The police did not know that he had hit Milton Long until he made this statement. The only question put to defendant was what had happened, and his answer diverted the attention of the police to Milton Long. In light of these circumstances, we find that defendant's utterances were spontaneous and voluntary.

Although the defense counsel originally raised the question of reliability, he effectively dropped it when he accepted the

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judge's suggestion that his objection involved voluntariness. The judge invited him in the voir dire to make additional claims or arguments, but he declined. If the judge committed any error in recasting the defense objection, the defense counsel by his acquiescence waived any exception. The defendant's statements were admissible under the *res gestae* exceptions, since they were made within fifteen minutes of his striking Milton Long. We find no grounds for a new trial, but remand for a new sentencing hearing.

No error in the trial. Remand for resentencing.

Judges WELLS and HILL concur.

STATE OF NORTH CAROLINA v. EDWARD CARL SCOTT

No. 8312SC1319

(Filed 4 December 1984)

1. Automobiles and Other Vehicles § 127.1— driving under the influence—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for driving under the influence where it tended to show that defendant emerged from a wreck smelling of alcohol, later admitted that he had had two beers during the night, appeared to be "high," and drove in an erratic and dangerous manner greatly in excess of the speed limit though the road and weather conditions were unfavorable.

2. Criminal Law § 90— no impeachment of State's own witnesses

The State did not impeach its own witnesses when the prosecutor asked the witnesses about prior written statements they had made, since their credibility was not attacked.

Judge HEDRICK concurs in the result.

Judge BECTON dissenting.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 4 August 1983 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 September 1984.

Because of one traffic accident, defendant was charged with involuntary manslaughter in violation of G.S. 14-18; driving under the influence in violation of G.S. 20-138; driving too fast for the

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weather conditions in violation of G.S. 20-141; unlawfully displaying a fictitious registration plate in violation of G.S. 20-111; driving while license revoked in violation of G.S. 20-28; and driving without insurance in violation of G.S. 20-313. He pled guilty to the license, registration and insurance charges and was tried and found guilty of the three other charges. His appeal is from the trial convictions.

The State's evidence tended to show that: At 4:30 o'clock in the morning on 6 February 1983, defendant was driving a 1972 Cadillac on U.S. 401 about five miles south of Fayetteville when the car collided with a vehicle traveling in the opposite direction occupied by Edwin Newton, Jr., who died from the collision. The wreck occurred on defendant's wrong side of the road. The highway was wet and driving conditions were bad. Earlier that night it had snowed, but without any accumulation on the highway, and was raining when the accident occurred. The speed limit for that area was 45 miles an hour. Defendant's car passed a stranded motorist, Staier Porter, about a mile from the accident scene traveling between 65 and 70 miles an hour, and when the car entered a curve it straddled the center line of the highway, but straightened up as it continued down the highway. About an hour and a half before the collision, Johnathan Ray saw defendant at a disco club in Raeford and the defendant had a beer in his hand, but Ray did not see him drink any of it. In Ray's opinion defendant "didn't seem drunk, but seemed like he was high." About an hour later, while driving home at a speed of about 55 miles an hour, Ray saw defendant's Cadillac pass him and another car traveling at a speed of about 100 miles an hour. When defendant's car approached him from the rear, it was straddling the center line and Ray pulled his car as far to the right as he could. After traveling on down the road a short distance, Ray saw the headlights of a car going in the opposite direction go out and then arrived at the scene of the wreck. After the wreck when Officer Baxley questioned defendant at the hospital, defendant admitted drinking two beers that evening. While being treated for his injuries and after having an I.V. placed in his arm, defendant refused to submit to a blood alcohol test, saying he did not want to be stuck with any needles. The test was requested because Officer Baxley saw some beer cans in defendant's car and smelled the odor of alcohol on defendant's breath.

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Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Assistant Public Defender Stephen C. Freedman for defendant appellant.

PHILLIPS, Judge.

[1] One of the two main contentions asserted by defendant is that the evidence presented was not sufficient to warrant defendant's conviction of driving under the influence. Two of the three elements of the offense—that at the time charged defendant was driving a motor vehicle upon a public highway—were clearly established and are not in dispute. The dispute is only whether the evidence was sufficient to show that defendant was under the influence of intoxicating liquor at the time. G.S. 20-138, repealed by Session Laws 1983, c. 435, s. 23, effective October 1, 1983. Testimony that defendant emerged from this wreck smelling of alcohol, later admitted that he had had two beers during the night, appeared to be "high," and drove in an erratic and dangerous manner, greatly in excess of the speed limit though the road and weather conditions were unfavorable, was sufficient, in our opinion, under the rule laid down in *State v. Hewitt*, 263 N.C. 759, 140 S.E. 2d 241 (1965), to warrant the jury in concluding that he was under the influence of an intoxicating liquor. See *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970); *State v. Cartwright*, 12 N.C. App. 4, 182 S.E. 2d 203 (1971).

[2] The defendant's other main contention is that the court, to defendant's prejudice, improperly permitted the State to impeach its own witnesses. In two instances the State, disappointed with the halting testimony of its witnesses, asked them to read portions of their written statements to the jury. The first instance involved State's witness Staiert Porter, who first expressed the opinion that defendant's speed at the curve a mile before the collision was 65 to 75 miles an hour; but upon "refreshing his recollection" by reading from his statement, he opined that the speed was 80 miles per hour. The second instance involved State's witness Johnathan Ray, who, when first asked about defendant's physical appearance two hours before the accident, responded that he "didn't appear to be drinking"; but when referred to his

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statement, he responded, "I never said I saw him drinking . . . I seen him with a beer, yeah." And then the following took place:

Q. All right, sir. Do you recall what your answer was back on February 11th, 1983?

A. February 11th?

Q. Yes, sir.

A. He had a beer in his hand.

Q. All right, sir. And did you go on to say something else after that?

. . . .

A. I said, "Yes, he had a beer in his hand. He didn't seem drunk but he seemed like he was high."

Our law is that though the State may not impeach its own witness, the trial judge, in his discretion, upon it appearing that the State has been genuinely misled or surprised, can permit the witness to be questioned about prior inconsistent statements. 1 Brandis N.C. Evidence § 40 (1982). Actually what the prosecutor did was not impeach the witnesses, since their credibility was not attacked, but ask them leading questions, which does not justify a new trial unless prejudice is shown. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977). And here the leading questions were not prejudicial to defendant. Porter's revised statement only added five miles to defendant's speed, which was grossly excessive under any view of the evidence, and evidence as to defendant's intoxication and irresponsible driving was overwhelming without Ray's addendum.

The defendant's several other assignments of error, which require no discussion, are likewise without merit.

No error.

Judge HEDRICK concurs in the result.

Judge BECTON dissents.

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Judge BECTON dissenting.

In the midst of defendant's ten arguments, set forth in forty-nine pages of his brief, are two assignments of error which the majority summarily dismisses and which I believe have merit. Defendant assigns error to the trial court's actions (a) overruling defendant's objection to the prosecutor's closing argument and (b) denying defendant's motion for mistrial based on the prosecutor's closing argument. Believing that the trial court improperly allowed the prosecutor to suggest to the jury that it could and should be influenced by public pressure, community expectations, public favor, and emotion, I dissent.

Over objection, the prosecutor was allowed to make the following argument to the jury:

Now, we often hear, we often read in the paper or hear on television or anything else, something that happens there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway. And, you know, you read these things and you hear these things and you think to yourself, 'My God, they ought to do something about that.' Well, Ladies and Gentlemen, . . . the buck stops here. You twelve jurors in Cumberland County have become the 'they.'

The prosecutor's appeal to some alleged community interest in convicting the defendant in this case based on community expectations about what should be done in cases in general draws the minds of the jurors away from the matters in evidence and subjects them to influences outside the case. While I am not so far from the practice of law that I stand ready to dampen the zeal of trial advocates who seek to argue the whole case as well of law as of fact, I feel constrained by *State v. Mayfield*, 28 N.C. App. 304, 220 S.E. 2d 643 (1976). In *Mayfield*, the prosecutor argued: "Ladies and gentlemen, you know that we have been having a great many of these type robberies of convenience stores here in our county, and we've got to do something about it to put a stop to it." 28 N.C. App. at 307, 220 S.E. 2d at 644-45. The trial court sustained defendant's objection to the remarks and instructed the jury not to consider the remarks. In *Mayfield*, this Court said: "Conceding that the solicitor's remark was improper, nevertheless any error was cured by the court's prompt instruction to

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the jury to disregard it followed by an instruction that they were to decide this case only on the evidence in this case and not to consider what might have happened at some other time and place." 28 N.C. App. at 307, 220 S.E. 2d at 645. In this case, there was obviously no curative instruction because defense counsel's objection was overruled. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983) also provides support for the position I reach. In *Kirkley*, the prosecutor, in his argument to the jury, stated in part: "I am asking you to impose the death penalty as a deterrent, to set a standard of conduct. . . ." 308 N.C. at 215, 302 S.E. 2d at 155. Although *Kirkley's* conviction was reversed on other grounds, the Supreme Court found the statement to be an improper interjection of the prosecutor's personal viewpoint. Based on *Mayfield* and *Kirkley*, I believe the defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA EX REL. RUFUS L. EDMISTEN, ATTORNEY GENERAL V. CHALLENGE, INC., EDWARD G. RECTOR, DOUGLAS L. BEEKMAN, CAROL A. RECTOR, ALLEN K. OAKS, AND RICHARD MAILMAN

No. 8310SC1121

(Filed 4 December 1984)

- 1. Rules of Civil Procedure § 56.5— plaintiff's motion to set forth uncontroverted facts—defendant required to provide information on each contested matter—no error**

Where a case came before the trial judge for the first time on plaintiff's Rule 56(d) motion to set forth uncontroverted facts and the record before the trial court was voluminous, containing many affidavits, depositions, transcriptions of tape recorded conversations, and lengthy and detailed motions, among other items, the court did not err by continuing the hearing and ordering defendants to provide the court information as to which portions of each matter defendants contended were contested. The order did not shift the burden of proof or require additional evidence; it merely required that defendants explain how each matter they contended was in controversy was disputed.

- 2. Rules of Civil Procedure § 56.5— Rule 56(d) motion—more specific response ordered—no error**

The court did not improperly reverse its ruling on plaintiff's Rule 56(d) motion to state uncontroverted facts where the court found that it was not practical at that time to ascertain which material facts were in controversy, ordered defendants to provide more information on the specific matters they

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contended were in controversy, and granted the motion after defendants' response.

3. Rules of Civil Procedure § 56.5— Rule 56(d) motion to state uncontroverted facts granted—evidence sufficient

Where the trial court granted summary judgment against defendants on the basis of issues of fact found by the court to be uncontested pursuant to Rule 56(d), the evidence was sufficient to support the court's ruling on plaintiff's motion to state uncontroverted facts where defendants responded to plaintiff's motion in several instances by merely asserting in a broadside manner that the matter was controverted, and in other instances merely asserted additional facts or objected to certain facts based on credibility and the subjective feelings of the witnesses asserting the facts. Moreover, any error as to whether a material fact was in controversy would be harmless since the trial court's findings contain several bases for the conclusion it reached.

APPEAL by defendants from Order of *Farmer, Judge*, dated 13 May 1982 granting plaintiff's motion to set forth matters of uncontested facts pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 56(d) (1983) and from judgment of *Bowen, Judge*, dated 9 June 1983 in favor of plaintiff. The Order and Judgment appealed from were rendered in Superior Court, WAKE County. Heard in the Court of Appeals 24 August 1984.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, Assistant Attorney General Alan S. Hirsch, and Assistant Attorney General Philip A. Telfer, for the State.

Purser, Cheshire, Manning & Parker, by Thomas C. Manning and Barbara A. Smith, for defendant appellants.

EAGLES, Judge.

On the basis of the pleadings and issues of fact found by the Court to be uncontested pursuant to Rule 56(d) of the North Carolina Rules of Civil Procedure, the trial court granted summary judgment against the defendants, finding them in violation of N.C. Gen. Stat. Sec. 14-291.2 (1981) (prohibiting pyramid or chain schemes), and N.C. Gen. Stat. Sec. 75-1.1 (prohibiting unfair and deceptive trade practices). By judgment entered 9 June 1983, the defendants, Challenge, Inc. (Challenge) and certain individuals, all officers, directors or employees of the corporate defendant, were permanently enjoined from operating their business in North Car-

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olina, and monetary damages were assessed against them. Defendants appeal.

I

Challenge is a Nevada corporation registered to do business in North Carolina, as well as in approximately twenty other states. Challenge is in the business of selling self-development motivational seminars. More specifically, the motivational course sold by Challenge is given in the form of four different seminars, known collectively as the "Adventure" Series, but which can be purchased separately.

An individual interested in becoming a sales representative or Independent Sales Agent (ISA) for Challenge generally attends an introductory meeting known as the "Shooting Star" Seminar, where he is told about the Challenge marketing program and about the Challenge Adventure series. If an individual decides that he or she wishes to become an ISA, that person must meet certain training requirements: (1) sell courses of a total value of \$5,000; (2) attend a salesperson workshop (different from the introductory meeting); and (3) pre-screen two other individuals who may be interested in selling the Challenge courses. The sales trainee receives a 20% commission on his own sales, and the ISA who sponsors the sales trainee receives a 30% commission on the trainee's sales. A sales trainee may purchase courses himself to meet his sales requirements, but he is not required to do so. Although the participants expressed various motives for doing so, the vast majority of sales trainees met their sales requirement by purchasing the Adventure Series for themselves or their family. Moreover, the trial court ultimately found as an uncontested fact that participants in defendants' program in North Carolina sold \$808,200 worth of courses by selling the seminar to themselves, and only \$4,700 worth of courses to persons not involved in defendants' sales program.

Following the complaint filed by the Attorney General in this matter on 4 September 1980 and the answer filed by defendants on 1 October 1980, extensive discovery ensued. Following discovery, Superior Court Judge Herring, on 9 December 1981, denied plaintiffs motion for partial summary judgment on the issue of liability for operating a pyramid scheme in violation of G.S. Sec. 14-291.2 (1981) and for engaging in unfair and deceptive trade

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practices in violation of G.S. Sec. 75-1.1 (1981), and further denied "plaintiff's motion under Rule 56(d) . . . specifically finding [that it was] not practicable to ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. However, such denial is without prejudice as to any potential future motion by said plaintiff under Rule 56(d)."

On 18 December 1981, plaintiff filed a written motion to set forth matters of uncontested fact pursuant to Rule 56(d). In the motion, plaintiff set out thirty-three separate material facts which it believed were uncontroverted. At the hearing on the motion, the defendants stipulated that twelve of these facts were not in controversy, but asserted, without providing specifics, that the remaining twenty-one facts were disputed. Superior Court Judge Farmer, following the hearing, found that the plaintiff, in setting out facts alleged to be uncontested, had "assumed facts not in evidence and incorporated them with facts in evidence." He further found and concluded that "it [was] not practicable to ascertain what material facts exist without substantial controversy and what material facts [were] actually and in good faith controverted." Judge Farmer did not deny the plaintiff's motion outright; rather, he ordered the defendant to provide to the court, within a specified time, information as to which portions of each matter defendant contended were controverted. Thereafter, he continued the hearing. Approximately five weeks later, defendants filed the requested information while simultaneously noting, for the first time, their objection to the trial court's order. The defendants' response did not contain any new evidence; rather, it consisted of defendants' argument regarding each of the allegedly controverted matters along with citations to the portions of the court file which purportedly supported their arguments.

On 13 May 1982, Judge Farmer, after making the requisite findings, ordered that all statements of fact listed in plaintiff's motion under Rule 56(d) be deemed established for purposes of trial.

From Judge Farmer's 9 June 1983 order finding defendants in violation of G.S. Sec. 14-291.2 (1981) and G.S. Sec. 75-1.1 (1981), defendants appeal. They contend that the trial court erred (1) in ordering the defendants to file documents with and provide infor-

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mation to the court showing what facts were in good faith controverted because this impermissibly shifted the burden of proof from the State to the defendant; and (2) in finding that each of the matters set forth in plaintiff's motion to set forth matters of uncontested fact was fully supported by the evidence and not in controversy. We disagree.

II

[1] The burden of proof under G.S. Sec. 1A-1, Rule 56 (1983) is on the moving party. The trial court specifically found, initially, that the plaintiff had, in its motion, assumed facts not in evidence and had further found that the evidence was insufficient to establish the non-existence of genuine controversy. Defendants therefore first argue that the trial court's action in granting the plaintiff's motion under Rule 56(d) was irreconcilably inconsistent with the court's previous finding and constituted reversible error, especially since the court received no further evidence from the movant.

We disagree with the defendants' assumption that "[t]he court apparently made this ruling because it did not feel the defendants had produced adequate evidence of controversy . . . [and] improperly shifted the burden of proof to the defendants." As stated by the plaintiff, the trial judge has a specific duty under Rule 56(d):

[T]he court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.

The record in this case was voluminous, containing many affidavits and depositions, transcriptions of tape recorded conversations, and several lengthy and detailed motions, among other items. The hearing on the plaintiff's 18 December 1981 motion was Judge Farmer's first contact with the case, and, in order to perform his duty under Rule 56(d), Judge Farmer asked the defendants to "come forth and provide the court information as to which portion of each matter is in good faith controverted as opposed to a broad statement that the entire matter is controverted." In our view, Judge Farmer's order does not require the defendants to assume a burden of proof; it does not require

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them to produce additional evidence. It merely orders them, pursuant to Rule 56(d), to explain by argument and reference to the record, how each matter they claim was in controversy was disputed. Defendants cite no cases in support of their contention that the trial court erred when he merely gave them an additional opportunity to further argue their case before making a final ruling.

Considering the above, and considering further that the State satisfied its burden with many citations to the record supporting its Rule 56(d) motion, we find no merit in this assignment of error.

III

[2] In their second assignment of error, defendants assert two claims. First, they argue that the trial court found that it could not ascertain what material facts were in controversy, yet, without receiving new evidence, improperly reversed its ruling. Second, they argue that the evidence was not sufficient to support the judge's ruling.

Considering our analysis in Part II, *supra*, we summarily reject defendants' assertion that the trial court reversed its ruling. The trial judge specifically stated that he could not determine "at this time" which facts were contested and which were not. In effect, he issued an interim order and asked defendants to provide a more specific response. Having considered the defendants' response during a period that exceeded two months, the trial court then made its final ruling. We are unable, as defendants would apparently have us do, to transform the judge's initial comments that it was not practical *at that time* to ascertain which material facts were in controversy into a ruling that it was not practical to do so at all. In any event, when a motion is still pending before a judge, he should be able to reconsider the motion based on a more complete review of the record and not be bound by his preliminary determination.

[3] We also reject defendants' argument that the evidence was not sufficient to support the trial judge's ruling. The plaintiff, in an addendum to their brief, has compared each fact which the State argued was uncontroverted with the defendants' response disputing those facts and has further analyzed the facts and responses to persuasively demonstrate that the trial court was

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correct. Having reviewed the addendum and the record, we conclude that in several instances the defendants made no response at all, but merely asserted, in a broadside manner, that the matter was controverted. In other instances, the defendants, without responding directly to the material facts said to be disputed in the State's Rule 56(d) motion, merely asserted additional facts or objected to certain facts based on credibility and the subjective feelings of the witnesses asserting the facts.

Moreover, any error as to whether a material fact was in controversy would be harmless in this case since the trial court's findings contain several bases for the conclusion it reached.

In this case, we find no error, and we

Affirm.

Judges HILL and BRASWELL concur.

STATE OF NORTH CAROLINA v. WILLIAM D. LACKEY

No. 8322SC1276

(Filed 4 December 1984)

1. Automobiles and Other Vehicles § 114— involuntary manslaughter case—error in failure to instruct on death by vehicle

In a prosecution for involuntary manslaughter, the trial court erred in refusing to instruct the jury on the lesser included offense of death by vehicle under former G.S. 20-141.4(a) where the jury could have concluded from the evidence that the only act of defendant that proximately contributed to the collision in question was not driving under the influence of intoxicants but was either driving at an excessive speed, failing to keep his car under proper control, or failing to maintain a proper lookout.

2. Criminal Law § 138— aggravating factor—element of offense

The trial court erred in finding as a factor in aggravation of involuntary manslaughter that defendant "had a highly elevated blood alcohol content of approximately .19 percent by weight, well above that necessary for the underlying driving under the influence violation" where the State relied on defendant's intoxication to show his criminal or culpable negligence, and defendant's intoxication was thus, in effect, an element of the offense. G.S. 15A-1340.4(a)(1)p.

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Judge BECTON concurring in the result.

Judge HEDRICK dissenting.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 10 August 1983 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 18 September 1984.

Because of one traffic accident defendant was charged with driving under the influence, second offense, and involuntary manslaughter, and the charges were tried together to start with. In that trial defendant was convicted of driving under the influence, but a mistrial was ordered as to the other charge because the jury was unable to reach a verdict. Upon re-trial for involuntary manslaughter, he was convicted of that charge also. The judgment imposed in the driving under the influence case was complied with and is not involved in this appeal; the sentence imposed in this case was five years in prison, whereas the presumptive term for involuntary manslaughter is three years.

The State's evidence tended to show that: On 1 October 1982 at approximately 8:15 o'clock at night, defendant was operating a 1970 Mercury automobile in a southerly direction on Highway 127 in Alexander County. As his vehicle approached an intersecting rural paved road a 1972 Volkswagen driven by Darrell Diamond pulled onto the highway and also headed south. When the Diamond car had traveled approximately 90 feet down the south lane of the highway defendant's car struck it on the left rear, and thereafter skidded about 170 feet into and along the northbound lane of the highway, where it struck a 1976 Oldsmobile operated by Helen Wike Reese, who died as a result of the collision. Defendant was taken to the hospital where a test of his blood revealed that the blood alcohol content was .19 percent. He also had the odor of alcohol about his person, his eyes were red, and his manner toward hospital and police personnel was abusive. The defendant presented no evidence.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders and Assistant Attorney General Thomas B. Wood, for the State.

Robert M. Brady for defendant appellant.

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PHILLIPS, Judge.

[1] Defendant contends that the trial court erred in failing to grant his request to charge the jury on the misdemeanor offense of death by vehicle. We agree and a new trial is necessary. Death by vehicle under G.S. 20-141.4(a), which applied when these events occurred but has been revised since then as G.S. 20-141.4(a2), is a lesser included offense of the common law felony of involuntary manslaughter, made punishable by G.S. 14-18. The distinction is that the lesser offense does not depend upon the presence of culpable or criminal negligence, it being enough to convict if death proximately results from the violation of a traffic statute or ordinance. *State v. Freeman*, 31 N.C. App. 93, 228 S.E. 2d 516, *rev. denied*, 291 N.C. 449, 230 S.E. 2d 766 (1976). In a case similar to the one before us, we held that the trial court's failure to submit the lesser included offense to the jury as a possible verdict was error that was not cured by a verdict of guilty on the more serious charge. *State v. Baum*, 33 N.C. App. 633, 236 S.E. 2d 31, *rev. denied*, 293 N.C. 253, 237 S.E. 2d 536 (1977). In this case, though the evidence presented supports the contention that defendant's criminal or culpable negligence in operating his car under the influence of intoxicating liquor contributed to the death resulting collision, it is also such that the jury could have found from it that the only act of defendant that proximately contributed to the collision was a mere violation of a speed or other traffic law. We particularly point to certain testimony of Darrell Diamond, whose car was hit by defendant's car before it caromed or skidded into the other lane of the highway and struck the car the decedent was in. According to Diamond: Upon stopping at the intersection he saw both defendant's car and the Reese car but thought it was safe to enter the highway and did so, with the result, however, that before his car had traveled more than 90 feet, it was struck by defendant's car, which "came flying up behind" him "real fast"; and at all times before the first collision defendant's car was in its proper lane and the Reese car was in its proper lane at all times. From this and other evidence in the case, including the physical evidence surrounding the wreck, the jury could have concluded that defendant's participation in the collisions that occurred was caused not by inebriation, but by either excessive speed, failing to keep his car under proper control, or failing to maintain a proper lookout, in violation of the

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various statutes pertaining thereto. Thus, an issue as to death by vehicle should have been submitted to the jury.

[2] In sentencing defendant to a longer term than the presumptive sentence for this offense, the court used as a factor in aggravation that: "The defendant had a highly elevated blood alcohol content of approximately .19% by weight, well above that necessary for the underlying driving under the influence violation." In doing so the court violated the Fair Sentencing Act, since defendant's intoxication was, in effect, an element of the offense and thus not usable as an aggravating factor. G.S. 15A-1340.4(a)(1)p. Essential to defendant's conviction of involuntary manslaughter was proof of his criminality or culpability. *State v. Freeman, supra*. The evidence mainly relied upon by the State to prove that element was the level of defendant's intoxication. We therefore reverse defendant's conviction and remand the matter for a new trial in accord with this opinion.

New trial.

Judge BECTON concurs in the result.

Judge HEDRICK dissents.

Judge BECTON concurring in the result.

Deeming it significant that defendant's driving under the influence and involuntary manslaughter charges were first joined for trial, I concur in the result. And I understand that the double jeopardy clause provides three separate guarantees:

[1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed. 2d 656, 664-5, 89 S.Ct. 2072, 2076 (1960). (Footnotes omitted.) However, the fact that the jury could not reach a verdict on the involuntary manslaughter charge distinguishes this case from *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S.Ct. 2260 (1980). Defendant could have been convicted of both offenses at a joint trial.

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Whether judgment would have had to have been arrested on one of the convictions is a question we need not decide.

Judge HEDRICK dissenting.

For the reasons set forth below, I respectfully dissent from the majority decision awarding a new trial to defendant:

On 22 August 1983 the defendant filed a motion for appropriate relief in which he alleged that "the Court erred by failing to dismiss the charge against the defendant on the grounds that it is in violation of the constitution of the United States in that the prosecution of the involuntary manslaughter charge results in former jeopardy." Although the record contains no ruling by the trial judge on defendant's motion for appropriate relief, the motion is deemed denied, under N.C. Gen. Stat. Sec. 15A-1448 (a)(4), because of the court's failure to rule on the motion within ten days. Defendant assigns error to the court's failure to dismiss the charge against him on the grounds of former jeopardy. I agree.

The record discloses that on 31 March 1983 defendant was found guilty of driving under the influence in violation of N.C. Gen. Stat. Sec. 20-138 (repealed 1983). Judgment was entered on the verdict sentencing defendant to serve six months in jail. On 10 August 1983 defendant was found guilty of involuntary manslaughter arising out of the same transaction as that giving rise to the earlier conviction of driving under the influence. The record affirmatively discloses that defendant's conviction of involuntary manslaughter was based on the underlying offense of driving under the influence in violation of G.S. 20-138.

The law applicable to the facts of the instant case is clear. In *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977), our Supreme Court held that prosecution of a defendant for involuntary manslaughter based on driving under the influence would be barred by the double jeopardy clause of the fifth amendment, where the defendant had earlier been acquitted of driving under the influence. Three years after our Supreme Court's ruling in *McKenzie*, the United States Supreme Court handed down its decision in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S.Ct. 2260 (1980). *Vitale* involved a defendant who had been con-

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victed of failing to reduce speed to avoid an accident; the State later attempted to prosecute the defendant for involuntary manslaughter. Said the Supreme Court: "[I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Id.* at 421, 65 L.Ed. 2d at 238, 100 S.Ct. at 2267. This Court cited and followed *Vitale* in *State v. Griffin*, 51 N.C. App. 564, 277 S.E. 2d 77 (1981), wherein we held that a defendant previously convicted of failure to yield the right-of-way could not subsequently be prosecuted for the offense of death by vehicle based on the underlying violation of failure to yield the right-of-way.

I think it clear from an examination of the record and the above-cited authorities that defendant in the instant case has twice been put in jeopardy for the offense of driving under the influence. Accordingly, I vote to arrest judgment in the case wherein defendant was convicted of involuntary manslaughter.

HOBSON CONSTRUCTION COMPANY, INC., RICHARD D. WOOD AND
MARGARETTA WOOD v. GREAT AMERICAN INSURANCE COMPANY

No. 8328SC1211

(Filed 4 December 1984)

**Insurance § 149— declaratory judgment—property damage not alleged within
meaning of policy—no error**

In an action for a declaratory judgment brought against an insurer after the individual plaintiffs had obtained a judgment against plaintiff construction company for breach of contract, the court did not err in ordering that the insurer was not obligated on the judgment where the policy was for property damage, defined as physical injury or destruction of tangible property or the loss of use of tangible property not physically injured or destroyed, and plaintiffs had alleged and the jury had awarded damages "in the nature of repair and cost of completion of the project." G.S. 1-254.

APPEAL by plaintiffs from *Lewis, Judge*. Judgment entered 15 August 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 September 1984.

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This is an action for declaratory judgment pursuant to G.S. 1-254 in which plaintiff-appellants seek a judicial declaration of the rights, benefits, duties and obligations of the parties to this action under the terms, provisions and conditions of a comprehensive general liability insurance policy issued by appellee, Great American Insurance Company (Great American), to appellant, Hobson Construction Company (Hobson).

The essential facts are:

Appellant Hobson is a North Carolina corporation engaged in building and construction with its principal office and place of business in Buncombe County.

Appellants Woods are nonresident owners of realty in Jackson County upon which Hobson constructed a concrete arch dam pursuant to a contract between Hobson and the Woods.

Hobson completed the construction of the dam and William E. Edens (Edens), the registered professional engineer who designed and supervised the construction of the dam, issued the certificate of completion 12 November 1976.

Water was impounded behind the dam in December of 1976, but the dam would not retain the water. Consequently, on 29 December 1976, the North Carolina Department of Natural and Economic Resources found the dam to be unsafe and ordered the impounded water completely drained.

On 2 August 1979, the Woods instituted an action in Superior Court, Buncombe County, against Hobson and Edens, jointly and severally, seeking to recover damages in the nature of repair cost and cost of completion of the project. This action was based on an alleged breach by Hobson and Edens of duty to perform fully obligations arising out of contracts with Woods, including Hobson's alleged failure to construct the concrete arch dam in a workmanlike manner and alleged actionable negligence on the part of Hobson and Edens.

Great American had issued a comprehensive general liability insurance policy (Number 8547624) to Hobson for the policy period of 1 April 1976 to 1 April 1977. Great American undertook Hobson's defense of the contract and negligence actions under a written reservation of rights. The case was tried before a jury which

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returned a verdict in favor of Woods on the contractual issue only. Judgment was entered 16 February 1981 against Hobson and Edens, jointly and severally, in the amount of \$69,760.96. No appeal was perfected from these judgments and they became final as between the parties.

Hobson thereafter demanded that Great American satisfy the judgment pursuant to its policy of general liability insurance. Great American refused and plaintiffs here (Hobson and Woods) instituted this declaratory judgment action on 10 September 1982 in order to determine whether Great American is obligated to pay the judgment rendered against its insured.

This action was tried at the 5 July 1983 civil non-jury session of Buncombe County Superior Court upon an agreed statement of facts and exhibits. After reviewing all matters of record and considering written and oral arguments of the parties, the trial court made findings of fact and conclusions of law and ordered that the general liability insurance policy issued by Great American to Hobson does not obligate Great American to satisfy the earlier judgment rendered against its insured. Plaintiffs appeal.

William E. Greene, for plaintiff-appellant Hobson Construction Company, Inc.

Van Winkle, Buck, Wall, Starnes and Davis, by Larry C. Harris, Jr. and Robert H. Haggard, for plaintiff-appellants Richard D. Wood and Margaretta Wood.

Roberts, Cogburn, McClure and Williams, by Isaac N. Northup, Jr., and Landon Roberts, for defendant-appellee Great American Insurance Company.

EAGLES, Judge.

I

A declaratory judgment action is designed to establish in an expeditious fashion the rights, duties, and liabilities of parties in situations usually involving an issue of law or the construction of a document where the facts involved are largely undisputed. Its

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purpose is to settle uncertainty in regard to the rights and status of parties where there exists a real controversy of a justiciable nature. *Wright v. McGee*, 206 N.C. 52, 173 S.E. 31 (1934). All orders, judgments and decrees in an action for declaratory judgment may be reviewed as other orders, judgments and decrees. G.S. 1-258. Declaratory judgment is appropriate for the construction of insurance contracts and in determining the extent of coverage under an insurance policy. *Insurance Co. v. Simmons, Inc.*, 258 N.C. 69, 128 S.E. 2d 19 (1962). The trial court properly undertook to interpret and apply the insurance policy in question to the facts here.

II

In this appeal, appellants assign the following five issues as error:

(1) Refusal of the trial court to find as fact and conclude as a matter of law that the Woods sustained "property damage" as that term is defined in the policy of insurance in question by virtue of the Woods' loss of use of the concrete arch dam for its intended purpose.

(2) Refusal of the trial court to find as fact and conclude as a matter of law that repeated flowing of impounded water under the foundation of the dam was an "occurrence" as that term is defined in the policy of insurance in question.

(3) Refusal of the trial court to find as fact and conclude as a matter of law that Hobson contracted with Great American for "completed operations coverage" and that the "occurrence" arose out of a "completed operations hazard" as that term is defined by the policy of insurance in question.

(4) Refusal of the trial court to find as fact and conclude as a matter of law that certain exclusions contained within the policy of insurance in question are inconsistent, ambiguous, and susceptible of two interpretations, thereby affording coverage that would obligate Great American to satisfy the Woods' judgment against Hobson.

(5) The trial court's signing and entry of the judgment in this matter.

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Appellee responds saying that there has been no showing of the "property damage" alleged by appellants to have arisen out of the loss of use of uninjured or undestroyed tangible property. We agree with appellee. Further, we find this issue dispositive of the appeal since appellants must prevail on this first issue in order for us to reach the remaining four issues.

We note that the insured here, the plaintiff-appellant Hobson, has the burden of bringing itself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage. *Nationwide Mutual Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 314 S.E. 2d 552 (1984). Our examination of the record before us reveals that Hobson has failed to show that the loss complained of is embraced within the insuring language of the policy. Consequently, we need not reach the issue of whether the complained of injury is excepted from coverage by an exception in the policy of insurance.

As applied to the facts in this case, in order for coverage to exist under the general liability insurance policy issued by Great American to Hobson, the insured (Hobson) must have become legally obligated to pay damages as a result of "property damage." If "property damage" occurred while the policy was in effect, the insurer must pay the legal damages due to such "property damage" absent some exclusion contained in the policy. On the other hand, if no "property damage" (as defined in the policy) occurred, the insurer would not be liable under the policy.

Property damage is defined in the policy of insurance as:

(1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or

(2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

In their pleadings in the original action, appellants Woods alleged that due to the breach of contract by Hobson and Edens,

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appellants Woods incurred damage "in the nature of repair and cost of completion of the project." The pleadings do not allege physical injury or destruction of tangible property which might be compensable under the first quoted policy definition, nor do the pleadings allege "loss of use" of tangible property which has not been physically injured or destroyed due to an occurrence which might be compensable under the second quoted definition. Plaintiff-appellants Woods and Hobson now (for the first time) argue, on appeal of the declaratory judgment, that compensable "property damage" occurred when the Woods lost the use of tangible personal property—the dam constructed by Hobson, the insured—due to the dam's failure to hold water and the ensuing order to drain the lake, all of which were due to the failure of Hobson and Edens to complete their contractual obligations. The damages awarded by the jury at trial were awarded on the basis of repair and completion cost and *not* on the basis of loss of use. There is no evidence in the record before us to indicate any evidence of damages resulting from loss of use, which is the theory of recovery argued on appeal by appellants.

We hold that appellants have failed to bring their particular injury within the insuring language of the policy. The order of the trial court is affirmed.

Our resolution of the first assignment of error disposes of the appeal and makes it unnecessary to consider appellants' remaining assignments of error.

Affirmed.

Judges WEBB and BRASWELL concur.

Boyce v. Meade

H. SPURGEON BOYCE v. SYLVIA LLOYD MEADE AND CAROL LLOYD CROWELL, Co-EXECUTRICES OF THE ESTATE OF LILLIE P. BOYCE, DECEASED, AND SYLVIA LLOYD MEADE AND CAROL LLOYD CROWELL, INDIVIDUALLY

No. 8414SC286

(Filed 4 December 1984)

1. Trusts § 13.2— parol trust—deeds intending to pass title

Plaintiff could not engraft an express parol trust on deeds to his wife which were intended to pass title.

2. Trusts § 13— conveyances to wife—no resulting trust

Plaintiff could not engraft a resulting trust upon his own conveyances to his wife in the absence of fraud, mistake or undue influence.

3. Trusts § 19— insufficient evidence of constructive trusts

Plaintiff's evidence was insufficient for the imposition of a constructive trust on entirety property and solely owned property conveyed by plaintiff to his wife because of potential liability from a lawsuit pending against him where the evidence failed to show that plaintiff's wife practiced any fraud, deceit, undue influence or wrongdoing upon plaintiff before or at the time of the conveyance of title.

4. Trusts § 13.2— alleged parol trusts—inapplicability of former statute

There was no occasion for a court to exercise jurisdiction under former G.S. 36-39(a) to require successors in interest of plaintiff's wife to reconvey to plaintiff property which he allegedly conveyed to his wife upon a parol trust where refusal to perform the terms of the alleged trust by the wife's successors occurred years after G.S. 36-39(a) was repealed.

APPEAL by plaintiff from *Clark, Judge*. Judgment entered 6 May 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 November 1984.

In this action plaintiff seeks to recover property, legal title of which he conveyed to his wife. Plaintiff, as grantor, executed seven deeds. Each conveyed the parcel of land described therein to plaintiff's wife, as grantee. The parcel of land conveyed by one of these deeds was owned solely by plaintiff. The parcels conveyed by the other six deeds were owned by plaintiff and his wife, and each deed recited that the conveyance was made in accordance with G.S. 39-13.3(c), dissolving the tenancy-by-the-entirety. Each deed contains a standard habendum clause with full covenants of warranty.

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Defendants, the heirs of plaintiff's wife, deny that plaintiff is entitled to any relief and seek an accounting from plaintiff for certain rents and profits allegedly collected by plaintiff from such property while title remained in the name of plaintiff's wife.

Defendants' motion for summary judgment was granted, denying relief to plaintiff and ruling that defendants were entitled to the rents and profits derived from the property.

Plaintiff appealed.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by J. A. Webster, III and George W. Miller, Jr. for plaintiff appellant.

Thomas J. Andrews for defendant appellees.

HILL, Judge.

The primary issue is whether the trial court erred in granting defendants' motion for summary judgment. We find that summary judgment was properly granted.

Upon motion a summary judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. His papers are meticulously scrutinized and all inferences are resolved against him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). In ruling on a motion for summary judgment, the court should not decide issues of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). "However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971).

Applying these basic tenets to the case under review, we address plaintiff's contention that summary judgment was improperly granted. This contention is based on there being a genuine issue of material fact by virtue of the existence of an express

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trust, resulting trust, constructive trust, or the relief provided by G.S. 36-39.

[1] (1) *Express trust*. Plaintiff's conveyance of his interest in the properties to his wife was "to protect the deceased's interest" owing to potential liability from a lawsuit pending against him. Plaintiff contends this conveyance was subject to an express parol trust with plaintiff's wife as trustee and the marital unit as beneficiary. However, plaintiff alone was grantor, and his own evidence indicated that the property "would be transferred back to recreate the pretrust ownership." Thus, if the alleged trust had been performed, plaintiff would have reacquired sole ownership of the property. The rule in *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028 (1909), prohibits the engrafting of a parol trust on a deed which intends to pass title.

[A] parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass.

Id. at 227, 63 S.E. at 1031. Such a trust would contradict the deed and defeat the very purpose for which the deed was made. Plaintiff's alleged express parol trust must be rejected as parol evidence, and thus, does not create an issue of fact to survive summary judgment under G.S. 1A-1, Rule 56(c).

[2] (2) *Resulting trust*. Plaintiff contends the following forecast of evidence was sufficient for a jury to find that a resulting trust existed in favor of plaintiff or the entirety entity: Plaintiff furnished from his own funds the purchase price of the real property in question and did so prior to title vesting in the name of his wife. Plaintiff did not intend the conveyance as a gift; rather, he and his wife intended that she be a temporary receptacle of legal title, with beneficial interest inuring to plaintiff alone. This arrangement was implemented to protect plaintiff's wife, "to make her feel better," and she was to convey the property back to plaintiff upon the passing of the threat posed by the lawsuit.

The failure of plaintiff's forecast of evidence, taken as true, to convert plaintiff's unenforceable express trust into a resulting trust is substantiated by *Skinner v. Skinner*, 28 N.C. App. 412,

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222 S.E. 2d 258, *disc. rev. denied*, 289 N.C. 726, 224 S.E. 2d 674 (1976). In *Skinner*, a wife sought to have a resulting trust declared and enforced on certain lands she had deeded to herself and her husband as tenants by the entireties. She had owned the land before her marriage, had paid the purchase price for it, and did not intend a gift of the property to her husband. The trial court declared the husband a trustee and this Court reversed and remanded for entry of judgment notwithstanding the verdict for the husband on the wife's resulting trust claim. This Court stated that "[h]ere, there was no conveyance by a third party to the husband upon consideration furnished by the wife. On the contrary, the wife is here attempting to engraft a trust *upon her own conveyance*. This she may not do in the absence of fraud, mistake, or undue influence. . . ." *Id.* at 417, 222 S.E. 2d at 262 (original emphasis). Plaintiff has failed to show any of these elements. Since no resulting trust arises under the facts disclosed by the evidence in the present case, an issue of fact for the jury did not exist.

[3] (3) *Constructive trust*. Plaintiff contends the evidence as hereinbefore stated was sufficient to warrant the imposition of a constructive trust, and therefore summary judgment in defendants' favor must be reversed. We disagree. The record is void of any evidence that plaintiff's wife practiced any fraud, deceit, undue influence or wrongdoing upon plaintiff before or at the time of the conveyance of title. Under these circumstances, plaintiff's cause of action, relying upon a constructive trust arising out of an alleged agreement that the grantee would hold the land for the benefit of the grantor and reconvey it upon his demand, must fail. See *Winner v. Winner*, 222 N.C. 414, 23 S.E. 2d 251 (1942).

[4] (4) G.S. 36-39. G.S. 36-39(a), which was repealed by Session Laws 1977, c. 502, s. 1, effective 1 January 1978, states in pertinent part the following:

When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the statute of frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest . . . shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the condi-

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tions upon which the interest shall be conveyed to the settlor or his successor in interest.

This statutory language is remedial in nature, stating that the intended trustee or his successor "shall be under a duty to convey the interest to the settlor." The time when this duty arises is when (a) "an interest in real property is conveyed by deed to a person on a trust," (b) "the intended trustee or his successor in interest still holds title," and (c) the intended trustee "refuses to carry out the trust." Absent the occurrence of these three elements, no "duty to convey" exists and no occasion exists for a court "having jurisdiction" to prescribe the condition upon which the interest "shall be conveyed to the settlor."

The evidence in the case under review reveals that plaintiff's wife still held title to the property after 31 December 1977, the last date of the statute's effectiveness. No evidence exists that she had refused to carry out her alleged oral trust before that time. Such refusal to perform the terms of the alleged trust was made by her successors in interest years after G.S. 36-39(a) expired. Therefore, there was no statutory duty to reconvey and no occasion for a court to exercise jurisdiction to enforce the duty.

We conclude that defendants were entitled to judgment as a matter of law, denying plaintiff relief and ruling that defendants were entitled to the rents and profits derived from the property. The judgment of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur.

Allen v. Standard Mineral Co.

LARRY W. ALLEN, EMPLOYEE/PLAINTIFF v. STANDARD MINERAL COMPANY,
EMPLOYER, HARTFORD ACCIDENT & INDEMNITY INSURANCE COM-
PANY, CARRIER/DEFENDANTS

No. 8410IC241

(Filed 4 December 1984)

1. Master and Servant § 69.1— silicosis—total disability—findings supported by evidence

The Industrial Commission's finding of fact that plaintiff was entitled to compensation for life was supported by evidence from three physicians that plaintiff suffered from silicosis, that he experienced weakness and shortness of breath at all times, and that this condition was exacerbated by any physical exertion, and by an education and work history consisting of graduation from high school followed by manual labor. G.S. 97-29.

2. Master and Servant § 97.1— salary continuation—deducted from compensation

Where plaintiff's employer continued paying his salary for 26 weeks after he left his employment and those 26 weeks were deducted from the 104 weeks of compensation mandated by G.S. 97-61.5, but the record did not indicate the legal status of the salary continuation, the matter was remanded to the Industrial Commission for further proceedings. If the salary continuation was a contract obligation, then plaintiff is due the 26 weeks compensation. G.S. 97-61.6.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 8 November 1983. Heard in the Court of Appeals 15 November 1984.

Plaintiff filed a claim for disability benefits under the Workers' Compensation Act alleging he was suffering from the occupational disease of silicosis. Deputy Commissioner Sellers found that plaintiff was totally and permanently disabled and directed defendant to pay compensation to plaintiff for his lifetime. Defendant appealed to the Industrial Commission which adopted and affirmed Deputy Commissioner Sellers' award. From the decision of the Industrial Commission defendant appeals.

Staton, Perkinson, West and Doster, by William W. Staton and Stanley W. West, for plaintiff appellee.

LeBoeuf, Lamb, Leiby and MacRae, by J. Frank Huskins and I. Edward Johnson, for defendant appellants.

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HILL, Judge.

Plaintiff is a forty-one year old male with a high school education whose work experience has been limited to manual labor. Plaintiff worked for defendant-employer in its Robbinsville plant for approximately twenty years, the last fourteen years continuously. Defendant-employer mines pyrophyllite which contains a great deal of silica. As a result of being exposed to silica dust in defendant-employer's plant, plaintiff has silicosis. Silicosis is an occupational disease in which scar tissue is formed around silica dust deposited in the lungs causing irreversible lung damage.

Plaintiff left his job as foreman at defendant's Robbinsville plant on 24 May 1980 upon the recommendation of the Advisory Medical Committee of the Industrial Commission. At that time and at subsequent examinations in 1981 and 1982 plaintiff was diagnosed as having silicosis grade I, with forty percent disability. Since leaving defendant-employer's plant, plaintiff has sought work at various local businesses as well as through the Employment Security Commission without success.

Plaintiff received his full salary from defendant-employer for twenty-six weeks after he terminated employment with them. At the end of the twenty-six weeks, plaintiff signed an agreement with defendant-carrier which provided that defendant-carrier would pay plaintiff the statutorily mandated amount, *see* G.S. 97-61.5(b), for one hundred and four weeks minus the twenty-six weeks paid by defendant-employer. After plaintiff's June 1982 medical examination by Dr. Seay, a final hearing in the cause was held to determine what compensation, if any, plaintiff was entitled to receive in addition to the one hundred and four weeks compensation already received by him. After the hearing the Commission entered an order holding that plaintiff was entitled to compensation for life because he was totally disabled and he was also entitled to an amount equal to the total due for the twenty-six weeks of the one hundred and four weeks compensation not paid by defendant-carrier. From the entry of this order defendants appeal.

When reviewing appeals from the Industrial Commission the court is limited in its inquiry to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the

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Commission justify its legal conclusions and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). This is so even if there is evidence which would support a finding to the contrary. *Id.*

[1] With these precepts in mind we look at defendants' first issue on appeal. Defendants contend there is insufficient competent evidence to support the finding that plaintiff's incapacity to earn wages as a result of silicosis is total and permanent which leads to a faulty conclusion that he is entitled to compensation and medical benefits for life.

Disability, as applied to cases of silicosis, means the incapacity of an employee to earn in any employment the wages he was receiving at the time of his last injurious exposure to silica dust. G.S. 97-54. The statutory definition is stated in terms of ability to earn not in terms of physical impairment. The question to be answered is what effect the disabling disease has had on this particular plaintiff's ability to earn taking into consideration his age, education and work training and experience. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E. 2d 837 (1982).

The Commission's finding, that plaintiff is entitled to compensation for life for total disability as that term is defined in G.S. 97-54, is amply supported by the evidence. The testimony of three physicians who had examined plaintiff was before the Commission. All three physicians agreed that plaintiff suffered from silicosis caused by prolonged exposure to silica dust. Dr. Bell, plaintiff's family physician, testified that he found that plaintiff had marked bilateral expiratory wheezing which indicated at least a fifty percent reduction in airway size. Dr. Bell noted that though he had never observed plaintiff while he was engaged in strenuous exercise, he had observed plaintiff when he had rested for five minutes after having walked from his car to the doctor's office. At those times, Dr. Bell commented, plaintiff was frequently dyspneic, short of breath and audibly wheezing. Dr. Bell stated that in his opinion plaintiff could not engage in sustained physical activity.

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Dr. Willis Seay, who examined plaintiff several times over a period of three years for the Industrial Commission, diagnosed plaintiff as having silicosis stage I. When asked whether plaintiff could continue to be employed in work which would require physical activity and manual labor, Dr. Seay replied he could not. Dr. Seay further testified that in his experience the majority of patients had not worked much after a diagnosis of silicosis. He suggested, "If they had some hobby that they could make profitable where they could . . . work a while and rest a while—they could get along pretty well. But to get out in modern industry, you can't do much."

Dr. Charles Williams who testified for defendants agreed that plaintiff had moderate pulmonary impairment which would prevent him from engaging in activities that are strenuous or call for prolonged exertion. The picture painted by the testimony of all three physicians was that of a man who experienced weakness and shortness of breath at all times and that this condition was exacerbated by any physical exertion.

Plaintiff presented evidence concerning his education and work history bearing upon his capacity to earn wages. Plaintiff began to work soon after he graduated from high school. He pursued no further education on his own and his job required no special training. All his adult life plaintiff has earned wages by the sweat of his brow. Even when he rose to the level of foreman with defendant-employer, plaintiff testified that his job entailed accounting for the other workers and "getting the job done" which required strenuous physical activity.

Citing *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965) defendants argue that plaintiff has failed to adequately establish a causal link between his medical condition and his total disability. Defendant claims the medical evidence presented before the Commission proved only a partial disability, and that the finding of total disability by the Commission is without evidentiary support.

Gillikin was an action for damages for personal injuries sustained in an automobile accident. At issue was the question of whether plaintiff's ruptured disc was the result of the accident or had an unrelated cause. The court said to hold defendant responsible for plaintiff's ruptured disc plaintiff must present sufficient

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evidence to establish *prima facie* the causal relation between defendant's negligence and plaintiff's injury and this they had failed to do.

We agree with defendant that the medical evidence in and of itself was not sufficient to support a conclusion of total disability. Here, however, medical evidence paints only part of the picture. Many factors must be weighed to determine if a man can earn a day's wage. If a man earns his living by his brain power, a physical impairment such as plaintiff's would have little effect on his work. If however a man earns his living by muscles and sweat, what can he do when his breath is gone? The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff has such capacity. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). We find the conclusion of the Commission that plaintiff is totally disabled adequately supported by the evidence.

[2] Defendants next argue that they are entitled to credit for the full salary paid to plaintiff for the twenty-six weeks after he left defendant's employment against the one hundred and four weeks compensation mandated by G.S. 97-61.6. The Industrial Commission found that the twenty-six week salary continuation should have been paid plaintiff in addition to the one hundred and four weeks compensation due under G.S. 97-61.5. It appears that if the salary continuation was a contractual obligation of defendant-employer then plaintiff is due the twenty-six weeks compensation not yet paid.

We have reviewed the hearing record carefully and are unable to find any competent evidence which would shed some light on the legal status of the twenty-six weeks salary paid. The only evidence presented on this issue was plaintiff's testimony that salaried people would automatically get six months pay if they were out of work in case of sickness. Because we feel that more information is necessary before an equitable decision can be made concerning this award we direct that this case be remanded to the Industrial Commission for further proceedings as to this issue only.

The order of the Industrial Commission is affirmed in part and remanded in part.

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Affirmed in part; remanded in part.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. JACQUELINE RUTH HUNTER

No. 843SC204

(Filed 4 December 1984)

1. Assault and Battery § 16.1— assault with deadly weapon—submission of lesser offense not required

In a prosecution for assault with a deadly weapon, the evidence was not conflicting as to the deadly character of the weapon so as to require the trial court to submit simple assault as a possible verdict where it showed that defendant was the aggressor and that she stabbed the victim with a three-inch lock-blade knife.

2. Assault and Battery § 15.7— assault with a deadly weapon—instruction on self-defense not required

In a prosecution for assault with a deadly weapon by stabbing the victim with a knife, evidence tending to show that the victim had earlier assaulted defendant did not require the trial court to instruct the jury on self-defense where the evidence was uncontradicted that defendant left the victim's presence for some time after being assaulted and then went to his table holding a knife, and where there was no evidence that defendant had a reasonable apprehension as to personal safety which would require self-protection by stabbing the victim.

3. Criminal Law § 142.4— restitution of medical expenses—condition of probation—findings as to ability to pay

The trial court erred in ordering defendant to pay restitution for the medical expenses of a felonious assault victim as a condition of probation without making findings as to defendant's ability to earn, her resources, her obligation to support dependents or any other matters which might affect her ability to make restitution. G.S. 15A-1343(d).

4. Criminal Law § 142.3— restitution for public defender services—condition of probation

The trial court properly ordered an indigent defendant to pay restitution to the State for the services of a public defender as a condition of probation without making an inquiry into defendant's ability to pay. G.S. 7A-455; G.S. 15A-1343(a)(10).

Judge WEBB dissenting.

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APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 28 July 1983 in Superior Court, PITT County. Heard in the Court of Appeals 19 October 1984.

Defendant was indicted for assault with a deadly weapon with intent to kill, but was tried on a charge of assault with a deadly weapon. The assault took place on 11 March 1983 at a disco club called "The Cave" in Pitt County. The victim, Sam Ward, was a bartender employed at the club but was not working on the night in question. Ward was dating Lorretta Cameron and they were together at a table near the rear of the club. Defendant is a former girl friend of Ward's and they had one child resulting from the prior relationship.

Ward had spoken with defendant earlier in the evening at the club and did not see her again until approximately 9:30 p.m. Ward testified that he was sitting at the table with Ms. Cameron when "he felt somebody hitting [him] in [his] side." Ward looked around and saw defendant "swinging her arm." Defendant and Ward tussled and he pushed her to the floor. Ward then noticed a wound in his thigh and a three-inch lock-blade knife being held by defendant. Ward then slapped defendant and bystanders moved in to separate them.

Defendant testified as to assaults that had occurred before the evening in question. Defendant also testified about the events that led to the crime with which she was charged:

[Ward] saw me talking to Nicky and called me over there to him. I wouldn't go because I knew what he was going to do. And he came up there to me and hit me beside of the head with his fist . . . Then I told him I was going to get him because I was tired of him hitting on me . . . Aaron asked me to dance. And when I came back and sat down I started talking and chatting with Nicky. I came to [Ward]—because he hollered clear over there—and I went over there to him, and then he started punching me in my stomach. And I said, . . . I am going to get you because I am tired of this . . . I was tired of [Ward] beating on me. I went to see some dude I had met that night. I asked him did he have a pocketknife. I said I had to cut something off my shirt. I went to [Ward] and [he] was looking at me when I went to him. And then as soon

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as I got to him [Ward] saw the knife and then that is when he punched me in my face. I fell.

She then stabbed Ward. When asked why she cut Ward with the knife, defendant replied "I was tired of him beating on me."

The evidence offered at trial also tended to show that at the time of the offense, defendant was sixteen years old with an eighteen-month old child. She was a tenth grade student at Ayden-Grifton High School. From a verdict of guilty and judgment imposing a suspended sentence of six months imprisonment, she appeals.

Attorney General Edmisten by Associate Attorney Michael Smith for the State.

Arthur M. McGlaulin for the defendant-appellant.

EAGLES, Judge.

[1] Defendant has assigned error to several portions of the trial court's instructions to the jury. She argues that the trial court erred by failing to submit "guilty of simple assault" to the jury as a possible verdict. The basis of defendant's argument is the assertion that the jury should have been permitted to find that the essential element of the deadly character of the weapon was absent in this case. There was sufficient evidence at trial from which the jury could find that the three-inch lock-blade knife used by the defendant was a deadly weapon. The trial judge properly instructed the jury on the manner of determining whether the pocketknife used by the defendant was a deadly weapon. *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947). Moreover, the State by showing that the defendant was the aggressor and that she stabbed Ward with a three-inch blade, complied with the mandate of *State v. Hall*, 305 N.C. 77, 84, 286 S.E. 2d 552, 556 (1982). There the court said: "When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element, no instruction on a lesser included offense is required." Therefore, we reject the defendant's argument that she was prejudiced by the court's failure to instruct on the issue of simple assault.

[2] The defendant next argues that the trial judge erred in failing to instruct the jury on the law pertaining to self-defense. The

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evidence is uncontradicted that the defendant left Ward's presence for some time and then went to his table holding a knife. While Ward's earlier behavior towards the defendant could be described as assaultive, there is absolutely no evidence that the defendant had a reasonable apprehension as to personal safety which would require self-protection by stabbing Ward. In fact, defendant was able to walk away, "see some dude" and get a knife. She then went to see Ward, apparently with retribution in mind. *State v. Moses*, 17 N.C. App. 115, 193 S.E. 2d 288 (1972). The defendant maintains that we should not consider the stabbing as being isolated from the earlier confrontations between Ward and the defendant and that her action of approaching Ward with an open knife was simply an attempt to dissuade him from future assaults. Since there was no evidence to show that Ward had done anything to warrant the defendant's use of a deadly weapon in self-defense, we find this assignment without merit.

[3] Finally, defendant argues that the trial court erred in awarding restitution for medical expenses and attorney's fees as a condition of probation without making proper findings of fact and conclusions of law.

G.S. 15A-1343(d) requires the trial court to take into consideration the resources of the defendant, her ability to earn and her obligation to support dependents as well as any other matters that pertain to her ability to make restitution or reparation prior to ordering restitution or reparation as a special condition of probation.

The trial court ordered defendant to pay a total of \$919.25 for the medical expenses of the victim Ward. The trial court made no findings of fact or conclusions of law as to defendant's ability to earn, her resources, her obligation to support dependents or any other matters that might affect her ability to make restitution. By the clear terms of G.S. 15A-1343(d) this was error.

[4] The trial court also ordered defendant to pay \$200.00 attorney's fees under the supervision and direction of her probation officer. Both the State and defendant argue that G.S. 7A-455 controls the awarding of attorney's fees in this case. G.S. 7A-455 states, in pertinent part:

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(a) If, in the opinion of the Court, an indigent person is financially able to pay *a portion, but not all*, of the value of the legal services rendered for him by . . . the public defender . . . [the Court] shall order the partially indigent person to pay such portion to the Clerk of Superior Court for transmission to the State treasury. [Emphasis added.]

Here, the trial court made it clear in the record that the fee awarded to counsel was \$200.00. This was the *total* fee which was ordered to be paid in restitution to the State for the services provided by the Assistant Public Defender, Robert L. Shoffner. G.S. 7A-455 by its terms applies only when an indigent person is determined by the court to be able to pay some but not all of the value of legal services rendered by a public defender. Here, it appears that the *entire* amount was ordered paid as a part of the costs as a condition of probation.

The award of attorney's fees was restitution to the State of North Carolina for the costs of a public defender pursuant to G.S. 15A-1343(a)(10). As such, the attorney's fees were part of the regular conditions of probation and did not require inquiry into defendant's ability to pay. We find no error in the ordering of payment of attorney's fees as restitution to the State of North Carolina as a condition of probation. Defendant's remaining assignments of error are without merit.

We reverse and remand for rehearing concerning the award of restitution for medical expenses against the defendant.

Judge BRASWELL concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I believe that the testimony of the defendant that Sam Ward hit her immediately before she stabbed him required the Court to submit self-defense to the jury. See *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). I vote for a new trial.

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STATE OF NORTH CAROLINA v. BRUCE EDWARD JOHNSON

No. 8420SC56

(Filed 4 December 1984)

1. Homicide § 30.3— second degree murder—no instruction on involuntary manslaughter—no error

In a prosecution for second degree murder, the trial court did not err in failing to submit involuntary manslaughter to the jury where defendant testified that he shot the victim after aiming a dangerous weapon in her direction, and all the evidence indicates that out of anger defendant acted impulsively and thoughtlessly, recklessly and wantonly.

2. Homicide § 26— second degree murder—peremptory instruction—no affirmative defense—no error

In a prosecution for second degree murder where there was no evidence of an affirmative defense, there was no error in the court's peremptory charge to the jury that there was no justification or excuse for defendant shooting the victim. Defendant's evidence of unintentional killing went to the issue of malice, and the court's instruction that there was no evidence of excuse or provocation could not have been understood to eliminate the issue of intent in light of the length and fullness of the explanation of malice and intent.

3. Criminal Law § 138— less than presumptive term—no right to appeal whether evidence sufficient for sentence

Where a defendant is sentenced to less than the presumptive term, he has no right to appeal the issue of whether his sentence is supported by the evidence introduced at trial. G.S. 15A-1444(a)(1).

APPEAL by defendant from *Fountain, Judge*. Judgment entered 11 October 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 25 September 1984.

The defendant Bruce Johnson is 24 years old and lives in Eagles Springs, Moore County. He met Louise Wall in July 1982, and fell in love with her. She was married and had six children. Defendant and Ms. Wall saw each other for about a year, meeting at defendant's home two to four times a month. Each time she visited, the defendant drove her home. He always carried a gun, at her request, to protect himself from her husband.

On 13 August 1983, Ms. Wall came to defendant's home. They discussed their relationship, defendant telling Ms. Wall that he could not go on living as he was, in misery and distress. Defendant testified that he told her he wanted to break off the relation-

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ship, and she became upset. They argued and defendant told Ms. Wall that he was going to take her home.

Defendant picked up his gun and they walked out on the porch. Defendant asked her whether she was seeing anyone other than her husband and him. She did not answer. They walked to the carport and he asked her the question again. She admitted she was seeing somebody else, a member of defendant's band. Defendant testified that on hearing this:

Well, I shot—my mind just went blank and I shot. It was a split second thing. Just aimed in her direction. I still loved Louise Wall at that time. I was very upset, enraged, had no stability of myself. She got up and ran 30 feet and fell. I checked her pulse and then went to my father's house and told him what I had done. I told him to call the police. Then I called my mother.

Ms. Wall died of the gunshot wound. The defendant was found guilty of second degree murder and was sentenced to fourteen years in prison and ordered to pay restitution of \$5,000 for the benefit of Ms. Wall's six minor children. From this judgment, he appeals.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Pollock, Fullenwider, Cunningham & Patterson, by Bruce T. Cunningham, Jr., for defendant appellant.

ARNOLD, Judge.

[1] The defendant contends that the trial judge erred in failing to submit the issue of involuntary manslaughter to the jury. The trial judge instructed the jury only on the charge of second degree murder. Second degree murder is an unlawful killing done without premeditation or deliberation, but with malice. *See State v. Foust*, 258 N.C. 453, 458, 128 S.E. 2d 889, 892 (1963). Malice is hardness of heart, ill will, or cruelty of purpose. *See State v. Wrenn*, 279 N.C. 676, 686-87, 185 S.E. 2d 129, 135 (1971) (Sharp, J., dissenting). It can be proved by showing an intent to engage in behavior or to do an act that is reckless or wanton or that naturally threatens human life. *See id.*; *State v. Wilkerson*, 295 N.C.

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559, 580-81, 247 S.E. 2d 905, 917 (1978). Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976).

The trial judge must instruct the jury as to a lesser offense than the one charged when there is evidence that the defendant committed the lesser offense. *See id.* "The presence of such evidence is the determinative factor." *Id.*, citing *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954).

In the case at bar, the defendant testified that after he and Louise Wall argued, he told her he would take her home. As they walked out to the carport, he asked her whether she was seeing someone else. She did not answer. Once they reached the carport, he repeated the question, and she replied that she was seeing someone else, a member of defendant's band. Defendant testified:

Well, I shot—my mind just went blank and I shot. It was a split second thing. Just aimed in her direction. I still loved Louise Wall at that time. I was very upset, enraged, had no stability of myself.

Defendant's testimony indicates that because of his anger at discovering that Ms. Wall, his lover, was seeing someone else, his mind went blank, and that impulsively and without thinking, he shot her. This seems clearly to have been a case where passion supplanted reason, and one would have expected the defendant to be arguing on appeal that the judge should have charged on voluntary manslaughter. The defendant has not pursued this exception, and we suspect this is because he is aware of the well-established rule in North Carolina that mere knowledge of a spouse or lover's affair with another is not deemed by law adequate provocation to reduce second degree murder to manslaughter. *See generally State v. Ward*, 286 N.C. 304, 312-13, 210 S.E. 2d 407, 413-14 (1974).

The defendant argues, rather, that because he was hysterical and "just aimed in her [Louise Wall's] direction" the trial judge should have instructed the jury on involuntary manslaughter. By his own testimony, defendant admits that he shot Louise Wall,

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after aiming a dangerous weapon in her direction. This is evidence of malice. See *Ward*, 286 N.C. at 312, 210 S.E. 2d at 413. He says that his mind went blank, and that he was upset and enraged, but this does not negate the presumption of malice. It only removes the elements of premeditation and deliberation. Defendant has presented no evidence that he became unconscious, or that he only meant to scare Ms. Wall, or that he was just waving the gun and it accidentally discharged. Rather, all the evidence indicates that out of anger he acted impulsively and thoughtlessly, recklessly and wantonly. The trial court did not err in charging the jury only on second degree murder.

[2] The defendant contends also that the trial judge erred in peremptorily charging the jury that there was no evidence of justification or excuse for the defendant shooting Louise Wall. The defendant argues that by making this charge the trial judge negated the defendant's defense that he did not intentionally kill Louise Wall. The defendant's assertion that he did not intentionally kill Ms. Wall went to the issue of malice: whether he had intent to commit an act so reckless and wanton that the law deems him to have acted "maliciously." Malice is an element of second degree murder. Defendant's defense as to intent, then, was an attempt to refute an element of the State's case for second degree murder.

Our review of the evidence indicates that the defendant did not produce evidence of an affirmative defense, that is, of an excuse or justification, such as self-defense, duress, or accident. The judge correctly observed in the charge that there was no evidence of excuse or justification. His observation was meant to narrow the issues for the jury's consideration. That is within his province. He fully explained the issue of intent, and at no point did he state that there was no evidence that the shooting was unintentional. In light of the length and fullness of the judge's explanation of malice and intent, we do not believe that his statement shortly after that there was no evidence of excuse or provocation could have been understood to eliminate the issue of intent.

[3] The trial judge sentenced the defendant to a term less than the presumptive fifteen years. He accordingly has no right to appeal the issue of whether his sentence is supported by the evidence introduced at trial. G.S. 15A-1444(a1).

Wil-Hol Corp. v. Marshall

No error.

Judges WELLS and HILL concur.

WIL-HOL CORPORATION, PLAINTIFF v. ZULA MARSHALL, RAY JOYNER
AND TILLIE JOYNER, DEFENDANTS/THIRD PARTY PLAINTIFFS v. TOWN OF
WAKE FOREST, THIRD PARTY DEFENDANT

No. 8410DC152

(Filed 4 December 1984)

Municipal Corporations § 31.1— zoning ordinance—standing to challenge—collateral attack

Plaintiff, the estranged wife of a month to month tenant whose lease in a trailer park had been lawfully terminated, had no interest in the trailer park property sufficient to allow her to challenge a zoning ordinance which indirectly forced the lessor to terminate the lease. Furthermore, plaintiff could not collaterally attack the zoning ordinance in a summary ejectment proceeding brought by the lessor.

APPEAL by defendant and third party plaintiff Tillie Joyner from *Redwine, Judge*. Order entered 27 September 1983 in District Court, WAKE County. Heard in the Court of Appeals 26 October 1984.

In this civil action, which started out as a summary ejectment proceeding, Tillie Joyner seeks to have the zoning ordinance of the Town of Wake Forest declared invalid and to enjoin its enforcement against her.

Plaintiff owns Wilkinson's Trailer Park in the Town of Wake Forest and Ray Joyner, Tillie's husband, rented a space therein on which was situated the mobile home that the Joyners occupied. On 18 April 1983 plaintiff filed a complaint in summary ejectment against "Ray Joyner and/or occupants" of the mobile home involved. The complaint alleged that proper notice of termination had been given to Ray Joyner and the occupants of the mobile home and that the lease terminated as of 1 April 1983. The Wake County magistrate who heard the matter decided in favor of plaintiff and Ray Joyner appealed to District Court. Prior to trial in District Court, Tillie Joyner moved to intervene as a

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defendant in the case, alleging that she had separated from her husband Ray, who had moved away, and she was the occupant of the mobile home involved. She also moved to intervene as a third party defendant in an action that Zula Marshall, another resident of the trailer park, brought against the Town of Wake Forest. The trial court allowed these motions, along with another motion by Tillie Joyner to consolidate the cases. In substance, Tillie Joyner's third party complaint alleged that Wil-Hol was trying to eject her and other trailer park occupants because the trailer park violated the Town's zoning ordinance and the Town had directed plaintiff to close the park; and it asked that the zoning ordinance be declared invalid and the Town enjoined from enforcing it.

The Town denied the material allegations of the third party complaint and counterclaimed for injunctive enforcement of its ordinance. It also moved to dismiss the third party complaint for its failure to state a claim for relief. After several intervening procedural steps, the motion to dismiss was heard in District Court and allowed. In that order, after finding that Ray and Tillie Joyner were month to month tenants of plaintiff, that Wil-Hol gave them due notice of the termination of the lease and the lease had expired, the court concluded that the third party plaintiff had no interest in the property involved and no standing to attack either the zoning ordinance or its application. Zula Marshall had earlier moved from the trailer park and her case became moot. Ray Joyner was found by the magistrate not to be a party. Thus, the court's order of dismissal applied only to Tillie Joyner's case and she appealed therefrom.

No brief filed for plaintiff Wil-Hol Corporation.

East Central Community Legal Services, by Augustus S. Anderson, Jr., for third party plaintiff appellant Tillie Joyner.

Ellis Nassif for third party defendant appellee Town of Wake Forest.

PHILLIPS, Judge.

We think that the trial court's dismissal of this action was proper for several reasons: Tillie Joyner had no legal authority to attack the zoning ordinance, and in undertaking to attack it she

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did not follow the established procedure for doing so. Although neither party has provided us with the review provisions of the Wake Forest Zoning Ordinance, we assume that they conform to the statutes that apply to all municipalities in this state. These statutes provide that "[a]n appeal may be taken by any person aggrieved" from any decision of a zoning officer to the town's Zoning Board of Adjustment, G.S. 160A-388(b), and that an appeal of zoning board decisions may be taken to the Superior Court "by proceedings in the nature of certiorari." G.S. 160A-388(e).

An "aggrieved" person in a zoning proceeding, so our courts have held on more than one occasion, must own the affected property or have some interest in it. *See Pigford v. Board of Adjustment (Kinston)*, 49 N.C. App. 181, 270 S.E. 2d 535 (1980), *rev. denied and appeal dismissed*, 301 N.C. 722, 274 S.E. 2d 230 (1981) and the cases cited therein. Ms. Joyner contends on appeal that developments in our case law have expanded the concept of property and that lessees under a month to month lease have a sufficient property interest in their rental premises to give them standing to challenge the validity of a zoning ordinance or to contest its application where it affects property that they rent. Without adopting or rejecting this premise as a statement of law, we do not find it applicable here. Ms. Joyner was the estranged wife of a month to month tenant whose lease had been lawfully terminated. She had no interest in the property sufficient under our law to allow her to challenge either her eviction from the property or the application of the zoning ordinance to it. The cases cited by Ms. Joyner, while they may well support her statement of the law, have no application to this case. *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, *appeal dismissed*, 422 U.S. 1002 (1975), involved a challenge to a zoning ordinance by a tenant under a written lease for a term of years, not a monthly tenancy or a tenancy at will. *Cumberland County v. Eastern Federal Corp.*, 48 N.C. App. 518, 269 S.E. 2d 672, *rev. denied*, 301 N.C. 527, 273 S.E. 2d 453 (1980), involved a challenge to a sign ordinance by the owner of a regulated billboard, not a lessee. And neither *Jones v. Neisler*, 228 N.C. 444, 45 S.E. 2d 369 (1947) nor *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E. 2d 176, *modified and aff'd*, 303 N.C. 675, 281 S.E. 2d 43 (1981) involved challenges to zoning ordinances. No decision authorizing a former lessee to challenge the application of a zoning ordinance that indirectly forced the

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lessor to terminate the lease has been either called to our attention or found in our research.

Since plaintiffs complaint neither alleged that she owned the property affected nor had an interest therein to support her challenge, her complaint was clearly dismissible for a lack of standing to sue under the provisions of Rule 12(b)(6) of the N.C. Rules of Civil Procedure. But even if it could be said that Ms. Joyner had a sufficient property interest to sustain her complaint, its dismissal by the District Court was nevertheless required. As already noted, the statutory procedure for challenging the validity of a zoning ordinance is to petition the Superior Court for certiorari to review the final decision of the Board of Adjustment. *City of Elizabeth City v. LFM Enterprises, Inc.*, 48 N.C. App. 408, 269 S.E. 2d 260 (1980). A zoning ordinance may not be collaterally attacked by a party that failed to avail herself of the judicial review that the ordinance and statutes authorize. Ms. Joyner's third party complaint is not a petition for certiorari, and there is no indication that she has ever sought to have the decision of the Wake Forest Board of Adjustment reviewed by any court.

The order appealed from is

Affirmed.

Judges WHICHARD and JOHNSON concur.

IN THE MATTER OF TONYA KIM MORGAN, MINOR

No. 8419SC271

(Filed 4 December 1984)

**Parent and Child § 1.6— proceeding to terminate parental rights and for adoption
—issue of fact as to willful abandonment**

In an action for adoption based on willful abandonment, summary judgment should not have been granted for petitioners where the forecast of evidence showed that respondent had not communicated with the child since 1979; that petitioner and respondent had fought almost constantly while married; that respondent had suffered numerous violent assaults from petitioner, her former husband; that she had been physically thrown out of the house by petitioner, who refused to let her take the child with her; that respondent had

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consented to leaving the child with petitioner and his parents because of her upset emotional state and lack of family support; that respondent's visitations had been hindered by verbal abuse and a threat to kill her; that respondent had chosen to minimize contact with the child because the child was upset by the conflict; that respondent's attempts to contact the child and to pay support had been obstructed and refused; that respondent had kept informed of the progress of the child through other contacts in the community; and that respondent had remarried and hoped for an eventual reunion with her daughter. The forecast of evidence raised a genuine issue of material fact as to whether respondent's lack of contact with the child was willful. G.S. 1A-1, Rule 56(c).

APPEAL by respondent from *Helms, William H., Judge*. Judgment entered 26 October 1983 in ROWAN County Superior Court. Heard in the Court of Appeals 15 November 1984.

Petitioner Rickie Alexander Morgan and respondent Stephanie Morgan Vaughn are the natural parents of the minor child Tonya Morgan, born in 1975. Petitioner and respondent separated in 1977 and petitioner obtained custody of the child with visitation rights to respondent. Respondent's motion in the cause to change custody in October 1978 was denied. In January 1979 a final divorce was granted, continuing petitioner's custody of the child. Respondent moved away, first to Greensboro, then to Virginia and to Washington state. She remarried in 1980. Although respondent retained visitation rights she did not see or talk to the minor child after some time in 1979, and never paid any child support, although under no order to do so.

Petitioner married co-petitioner Pamela Laverne Earle Morgan in September 1981. In July 1982 petitioners filed a petition asking for the adoption of the child by Pamela Morgan. Petitioners alleged that respondent had abandoned the child, and that the adoption could therefore proceed without her consent. Petitioners further alleged that they could not locate respondent to effect service of process. A final order of adoption, based on respondent's wilful abandonment, was entered 15 September 1982. On 14 September 1983, upon respondent's appearance contesting the diligence and sufficiency of attempted service of process, the court declared its prior order void, and the matter was thereupon set for jury trial. Petitioners moved for summary judgment on the issue of abandonment on 23 September 1983, and the court granted the motion 26 October 1983. Respondent appealed.

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Mona Lisa Wallace for respondent.

No brief for petitioner.

WELLS, Judge.

This appeal presents one question, the propriety of summary judgment on the issue of abandonment. "A motion for summary judgment is properly granted under N.C. Gen. Stat. § 1A-1, Rule 56(c) of the Rules of Civil Procedure 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982)." *Dumouchelle v. Duke University*, 69 N.C. App. 471, 317 S.E. 2d 100 (1984). When the controverted issue involves subjective intent, credibility becomes critical and summary judgment is generally inappropriate. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980) (fraudulent intent); *Cochran v. Piedmont Publishing Co.*, 62 N.C. App. 548, 302 S.E. 2d 903, *disc. rev. denied and appeal dismissed*, 309 N.C. 819, 310 S.E. 2d 348 (1983) (actual malice).

In order to prevail here, petitioners had to conclusively establish that respondent had "willfully abandoned" Tonya for at least six months preceding the action. N.C. Gen. Stat. §§ 48-5 and 48-2(1) (Supp. 1983). Simply showing abandonment would not suffice; the abandonment must be wilful. *In re Adoption of Hoose*, 243 N.C. 589, 91 S.E. 2d 555 (1956); *In re Maynor*, 38 N.C. App. 724, 248 S.E. 2d 875 (1978). Wilfulness requires some conscious choice purposely made, *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E. 2d 553, *reh. denied*, 279 N.C. 397, 183 S.E. 2d 241 (1971), or conduct without just cause, excuse, or justification. *State v. McCoy*, 304 N.C. 363, 283 S.E. 2d 788 (1981). Actions which are the product of coercion or duress are not wilful. *In re Clark v. Jones*, 67 N.C. App. 516, 313 S.E. 2d 284 (1984); *see also State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983); 94 C.J.S. *Willful* (1956). In *Clark*, we vacated an order which found that respondent mother had wilfully abandoned her child, where the trial court failed to address evidence that she had moved away because of the violent behavior of her husband. And in *Maynor* we overturned a jury's finding of wilful abandonment

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where the father had been in prison, without knowledge of his son's whereabouts and without paying any support. Since the father had attempted to have relatives find the child, and since his imprisonment prevented payment of support, the evidence did not suffice to support a verdict of *wilful* abandonment.

In the present case, petitioners produced a forecast of evidence which tended to show that respondent had not communicated with Tonya since 1979 and had not furnished any support. Respondent's forecast of evidence tended to show the following: During the marriage petitioner Rickie Morgan and respondent fought almost constantly, and respondent suffered numerous violent assaults from her physically superior husband. She was physically thrown out of the house by Rickie Morgan, who refused to let her take Tonya with her. Because of her upset emotional state and lack of family support, respondent then consented to leaving Tonya with petitioner and his parents. The Morgans hindered respondent's visitations, abusing her verbally and on one occasion threatening to kill her. This conflict upset Tonya and respondent consciously chose to minimize contact with Tonya to avoid disturbing her. Respondent tried to contact Tonya and offered to pay support, but these attempts were obstructed and refused by the Morgans. Respondent remarried in 1980 and settled in Washington, working steadily at her husband's wholesale company. She continued to desire and hope for an eventual reunion with her daughter, and kept informed of her progress through other contacts in the community.

This forecast of evidence raises a genuine issue of material fact as to whether respondent's lack of contact with Tonya was compelled by the petitioners' behavior and was because of concern for the well-being of Tonya and for her own physical safety; and whether any decision by respondent to avoid contact with Tonya was the product of petitioners' abusive and coercive behavior and thus not wilful. *In re Clark, supra; In re Maynor, supra*. Summary judgment was, therefore, improvidently granted.

Reversed.

Judges ARNOLD and BECTON concur.

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TROY L. GARRISON, SR. v. TROY L. GARRISON, JR., ERIKA K. GARRISON, R. D. DOUGLAS, JR., TRUSTEE, ROBERT BRUCE GERBER, AND BARBARA CHESTNUTT (GERBER)

No. 8418SC59

(Filed 4 December 1984)

Bills and Notes § 19; Evidence § 32.4— promissory note—parol evidence concerning consideration

In an action on a promissory note, testimony by one of the makers of the note that money was advanced by plaintiff as a gift and that the note was given to plaintiff for tax purposes with no intention that it be repaid was not barred by the parol evidence rule since it did not vary the terms of the note but tended to show that the note was not supported by consideration and was a sham.

APPEAL by defendant from *Wood, Judge*. Judgment entered 19 October 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 October 1984.

The defendant Erika K. Garrison appeals from the entry of summary judgment against her. The plaintiff alleged that during the years 1979 and 1980 he had made loans to Troy L. Garrison, Jr., the plaintiff's son and Erika K. Garrison, the wife of Troy L. Garrison, Jr., totalling \$96,200.00 in order for the defendants Garrison to purchase a lot in Greensboro, N.C. and construct on it a house. The plaintiff alleged further that in January 1980 the defendants Garrison had executed a note to the plaintiff in the amount of \$96,200.00 as evidence of the indebtedness.

The plaintiff also alleged that the defendants Garrison had sold the house and lot to the defendants Gerber and taken a deed of trust on the property with R. D. Douglas as trustee. The plaintiff alleged further that he had paid a certain indebtedness for the defendants Garrison to Wachovia Bank and Trust Co.

The plaintiff prayed for a judgment on the note for \$96,200.00 with attorney fees, a judgment for the money plaintiff had paid for the defendants Garrison to Wachovia, a resulting trust on the promissory note and deed of trust given by the defendants Gerber to the Garrisons, a constructive trust on the note and deed of trust, an injunction against any payments on the note by the Gerbers, and a lien on property Erika Garrison had bought with part

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of the proceeds of the sale of the property she and her husband had bought with the money lent to them by the plaintiff.

Troy L. Garrison, Jr., did not file an answer and a default judgment was entered against him. Erika Garrison filed an answer in which she denied the material allegations of the complaint.

The plaintiff made a motion for partial summary judgment as to the indebtedness on the note. In support of the motion he filed affidavits by him and his son that he had made loans totalling \$96,200 to Troy L. Garrison, Jr., and Erika K. Garrison and they had made the note to him as evidence of the indebtedness. Erika K. Garrison filed an affidavit in which she stated that she had never received any of the money from the plaintiff. She said all the money was advanced as a gift to Troy Garrison, Jr., who used it to purchase the lot and construct the house. She stated further that Troy L. Garrison, Jr., had asked her to sign the note in order for his father to have it for tax purposes. She said she did not sign the note as evidence of an indebtedness from her but in order for her father-in-law to have the note for tax purposes.

The Court granted the plaintiff's motion for partial summary judgment in the amount of \$96,200.00 and attorney fees against the defendant Erika K. Garrison. She appealed.

M. Jay Devaney and John P. Daniel for plaintiff appellee.

Dees, Johnson, Tart, Giles and Tedder by J. Sam Johnson, Jr., for defendant appellant.

WEBB, Judge.

At the outset we note that the judgment from which the appeal is taken does not dispose of all the claims and is interlocutory. The Court did not make a finding pursuant to G.S. 1A-1, Rule 54(b) that there is no reason for delay. We hear the appeal within our discretion.

The appellee contends that testimony by Erika K. Garrison that the money advanced by the plaintiff was a gift and it was not intended by the parties that the note be paid is barred by the parol evidence rule. He argues that without this evidence there is not a genuine issue to a material fact and he is entitled to judg-

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ment as a matter of law on the note. The resolution of this question depends on whether the testimony of Erika K. Garrison may be considered under the parol evidence rule. The purpose of the parol evidence rule is to give legal effect to the intention of parties to make their written contract a complete expression of their agreement. It prevents the contradiction or variation of the terms of any such agreement. The rule does not come into play until the existence of an enforceable agreement has been shown. See *Contracts*, by E. Allan Farnsworth, Little Brown and Company, 1982, 7.2 et seq., page 447 for an excellent discussion of the parol evidence rule. Our Supreme Court has said that the terms of an agreement are more likely to be only partially integrated in a promissory note. *Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E. 2d 414 (1973).

In this case the appealing defendant has testified by affidavit that there was no consideration for the note and that it was a sham. She says in her affidavit that the money was advanced as a gift without any expectation of its being repaid. If this is so there was no consideration for the note and she is not obligated on it. *Bank v. Holland*, 51 N.C. App. 529, 277 S.E. 2d 108 (1981). The note would not be one for an antecedent obligation as contemplated by G.S. 25-3-408 because a gift does not create a legal obligation. Erika K. Garrison has also testified by affidavit that the note was given for plaintiff's tax purposes with no intention that it be repaid. If this is true the note is a sham. If the jury should believe either of Erika K. Garrison's contentions she would not be liable on the note. Neither of them contradict nor attempt to vary the terms of the note. Both are based on the theory that the note is of no effect. This evidence is not barred by the parol evidence rule. It was error to grant the plaintiff's motion for partial summary judgment.

The appellee relies on *Bank v. Moore*, 138 N.C. 529, 51 S.E. 79 (1905); *Boushall v. Stronach*, 172 N.C. 273, 90 S.E. 198 (1916); *Kindler v. Bank*, 204 N.C. 198, 167 S.E. 811 (1933); *Bank v. Dardine*, 207 N.C. 509, 177 S.E. 635 (1935); *U.S. v. Cahoon*, 151 F. Supp. 584 (D.C. N.C. 1957); *Bank v. Slaughter*, 250 N.C. 355, 108 S.E. 2d 594 (1959); *Consolidated Vending Co. v. Turner*, 267 N.C. 576, 148 S.E. 2d 531 (1966). We do not believe any of these cases govern. In each of them there was an indebtedness incurred for consideration. The Court in each case held that the payor or debt-

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or would not by other evidence contradict his promise to pay. In this case the appellant contends there was not an indebtedness supported by consideration and the execution of the note was a sham.

The defendant has also pled the statute of limitations. The note is a demand note made in January 1980. The statute began running at the time it was made. *Shields v. Prendergast*, 36 N.C. App. 633, 244 S.E. 2d 475 (1978). The action was commenced within three years of the giving of the note and is not barred by the statute of limitations.

Reversed and remanded.

Judges BRASWELL and EAGLES concur.

FRANK M. ADKINS v. FIELDCREST MILLS, INC.

No. 8410IC287

(Filed 4 December 1984)

Master and Servant § 97.1— workers' compensation award—remanded for further findings

An order was remanded to the Industrial Commission where the action was decided before *Rutledge v. Tultex Corp.*, 308 N.C. 85, was handed down, the Commission made no finding as to whether plaintiff's exposure to cotton dust significantly contributed to or was a significant causal factor in his chronic obstructive lung disease, and the record was not sufficient for the Court of Appeals to draw a conclusion as a matter of law. G.S. 97-53(13).

APPEAL by defendant employer from opinion and award of the North Carolina Industrial Commission filed 21 December 1983. Heard in the Court of Appeals 27 November 1984.

Plaintiff filed this claim under the Workers' Compensation Act, asserting that he is entitled to benefits under the Act because of disability resulting from an occupational disease. Following a hearing, the Industrial Commission made findings of fact and conclusions of law and entered an opinion and award directing defendant to pay plaintiff compensation. Defendant appealed.

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Ling & Farran, by Stephen D. Ling, for plaintiff, appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., and Caroline Hudson, for defendant, appellant.

HEDRICK, Judge.

The sole question presented on this appeal is set out in defendant's brief as follows:

Whether the Industrial Commission erred in finding and concluding that the employee is disabled as a result of a compensable occupational disease and in awarding compensation to the employee, on the grounds that all competent evidence supports a finding and conclusion that the employee's exposure to cotton dust did not cause or significantly contribute to the development of his chronic obstructive pulmonary disease.

The opinion and award entered by the Industrial Commission contains the following pertinent findings of fact and conclusions of law:

1. Plaintiff is 67 years old and worked for defendant-employer from February 17, 1933 to April 3, 1978 (43 years) except for about two years in the Army from 1944-1946. Plaintiff worked in the weaving department and was exposed to respirable cotton dust for at least 27 years (1933-1960) when he processed 100 percent cotton. Thereafter, he was exposed to respirable cotton dust in lesser concentrations due to the processing of more synthetics than cotton. Plaintiff was last exposed to cotton dust in 1976.

2. Plaintiff's breathing problem became noticeable about 1950. He experienced shortness of breath at work and in close spaces. After his problems became noticeable, plaintiff experienced wheezing and coughing and chest tightness at work continuously. His problems were better away from work and worse while at work. In 1977, plaintiff passed out one morning at work during pulmonary function surveillance tests conducted at the mill. Plaintiff stopped working for defendant-employer because of his breathing problems.

. . .

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4. Plaintiff started smoking about 1936 and has smoked one pack per day or less since that time. Plaintiff smoked about 14 years before his breathing problem became noticeable. For about 20 years plaintiff could not smoke at work. After about 1960, smoking booths were put in. Plaintiff continues to smoke some, but he has cut down substantially.

5. Plaintiff has experienced shortness of breath every day of the week at least since 1973 and has experienced chronic chest tightness since 1971.

. . .

12. Plaintiff has moderate chronic obstructive pulmonary disease, and more specifically, suffers from chronic bronchitis, slight asthma and emphysema due to cigarette smoking and contributed to and aggravated by his cotton dust exposure, i.e. causes and conditions characteristic of and peculiar to his employment with defendant-employer.

. . .

14. . . . [H]owever, including that period of acute illness, plaintiff has been partially disabled since April 3, 1978 from chronic obstructive pulmonary disease which was at lease [sic] aggravated by his occupational exposure to cotton dust.

In *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983), our Supreme Court discussed at some length the difficulty experienced by the courts "in both articulating and applying a factual standard for determining whether there is an appropriate causal connection between the employment and the disease" in cases involving "lung disease." *Id.* at 94, 301 S.E. 2d at 365. The *Rutledge* court attempted to alleviate that difficulty by articulating a new legal standard by which to determine whether a claimant suffering from lung disease has a compensable occupational disease under G.S. 97-53(13):

[C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is

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so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Significant means "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." Webster's Third New International Dictionary (1971). *Significant* is to be contrasted with *negligible*, *unimportant*, *present but not worthy of note*, *miniscule*, or of *little moment*. The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Id. at 101-02, 301 S.E. 2d at 369-70.

In the instant case, the Commission decided plaintiff's claim without benefit of the Supreme Court decision in *Rutledge*, which had not yet been handed down. Consequently, the Commission made no finding of fact as to whether plaintiff's exposure to cotton dust *significantly contributed to*, or was a *significant causal factor in*, the chronic obstructive lung disease from which plaintiff suffers. Although both plaintiff and defendant contend that the evidence in the record is of such a nature as to permit this Court to affirm or reverse the Commission's ruling without benefit of remand for additional findings of fact, we do not agree. Our examination of the record reveals evidence from which the Commission could find whether exposure to cotton dust significantly contributed to the development of plaintiff's lung disease. That evidence and the findings made by the Commission are insufficient, however, to permit this Court to draw such a conclusion as a matter of law.

For the reasons stated the order awarding plaintiff compensation for an occupational disease is vacated, and the cause is remanded to the Industrial Commission to make appropriate findings from the evidence as to whether exposure to cotton dust was "significant" in the development of the lung disease from which plaintiff suffers, and to enter an appropriate order.

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Vacated and remanded.

Judges WEBB and HILL concur.

WILLIE MAE JOYNER, WIDOW OF JESSE JOYNER, DECEASED, EMPLOYEE, PLAINTIFF v. J. P. STEVENS AND COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC343

(Filed 4 December 1984)

Master and Servant § 55.1—workers' compensation—death from occupational disease—time of "accident"

An employee's "accident" leading to his death from chronic obstructive lung disease occurred, for the purposes of compensation under G.S. 97-38, when the employee's permanent partial disability due to chronic obstructive lung disease began rather than on the date he became totally disabled, and plaintiff's claim for death benefits under G.S. 97-38 was barred where the employee died over six years after his "accident."

APPEAL by defendants from an opinion and award of the Industrial Commission filed 3 November 1983. Heard in the Court of Appeals 29 November 1984.

The evidence and findings establish the following uncontroverted facts: On 4 June 1980 the Industrial Commission found that deceased employee Jesse Joyner had contracted chronic obstructive lung disease due to his occupational exposure to cotton dust while employed by defendant J. P. Stevens (hereinafter defendant). The Commission made an award of compensation for permanent partial disability pursuant to G.S. 97-30 for a period beginning 23 December 1975 and not to exceed 300 weeks. Joyner became totally disabled on 10 October 1980, and died as a result of his occupational disease on 19 March 1982. Plaintiff, who is the deceased employee's widow, applied for death benefits under G.S. 97-38.

The Commission found and concluded that the date of the "accident" leading to death was, for purposes of compensation under G.S. 97-38, 10 October 1980, the date when the deceased employee's total disability began. On the basis of the foregoing

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conclusion, the Commission awarded plaintiff benefits in accordance with G.S. 97-38. Defendants appealed.

Charles R. Hassell, Jr., for plaintiff, appellee.

Maupin, Taylor & Ellis, P.A., by David V. Brooks, for defendants, appellants.

HEDRICK, Judge.

This appeal raises the single question of whether plaintiff is entitled to benefits pursuant to G.S. 97-38, which in pertinent part provides: "If death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, the employer shall pay . . . compensation. . . ." Resolution of this question depends upon when the "accident" occurred that ultimately caused the deceased employee's death.

Because occupational diseases usually develop over a prolonged period of exposure to hazardous conditions rather than from a single event, G.S. 97-52 defines "accident" as "[d]isablement or death of an employee resulting from an occupational disease. . . ." See *Booker v. Medical Center*, 297 N.C. 458, 482-83, 256 S.E. 2d 189, 204-05 (1979). G.S. 97-54 provides that "disablement" is equivalent to "disability" as defined in G.S. 97-2(9), which is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Thus an "accident" within the meaning of G.S. 97-38 occurred when the deceased employee's disability due to chronic obstructive lung disease began.

Plaintiff contends that her husband's decline from partial disability to total disability status on 10 October 1980 constituted an "accident" within the meaning of G.S. 97-38, as the Commission concluded. His 19 March 1982 death therefore would have occurred within two years of the accident, entitling her to G.S. 97-38 benefits. Plaintiff notes that the policy of liberally construing workers' compensation statutes to allow coverage supports her contention.

We nonetheless believe the deceased employee's "accident" occurred on 23 December 1975. That is the date he officially lost

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wage earning capacity due to his occupational disease and became disabled. Clearly, he suffered an "accident" on that date. G.S. 97-38 contemplates only one accident leading to death when it states "the accident." Death benefits accrue only if death occurs within the maximum statutorily set time after "the accident." It would defy legislative intent to hold that subsequent changes in disability status arising from the same occupational disease created new "accidents," thereby renewing the time limit for claiming G.S. 97-38 benefits.

As defendants contend, the rule limiting occupational disease victims to a single claim for purposes of the statute of limitations in G.S. 97-58(c) applies by analogy to allow occupational disease victims to claim only one "accident" under G.S. 97-38. In rejecting a claimant's argument that the limitations period began to run from the time when his disability status changed from partial to total, the Supreme Court stated,

We did not in any way indicate in *Taylor [v. Stevens & Co., 300 N.C. 94, 265 S.E. 2d 144 (1980)]* that only total and permanent disability would trigger the running of the two year period or that a separate, independent and additional two year period would commence under the statute if the employee's disability from the occupational disease evolved from permanent partial disability into permanent total disability.

Dowdy v. Fieldcrest Mills, 308 N.C. 701, 714, 304 S.E. 2d 215, 223 (1983). Thus the onset of plaintiff's husband's disability on 23 December 1975 was the only "accident" from which the G.S. 97-38 time limits for benefits ran. Because plaintiff's husband died in 1982, over six years after his "accident" within the meaning of G.S. 97-38, plaintiff's claim for benefits under G.S. 97-38 is barred.

Our holding is a harsh but necessary result of the statutory scheme.

We recognize that application of G.S. 97-38 may sometimes have the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time. . . . The remedy for any inequities arising from the statute, however, lies not with the courts but with the legislature.

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Booker, supra, 297 N.C. at 483-84, 256 S.E. 2d at 205. The legislature has amended G.S. 97-38 to cover occupational disease deaths where the employee had total disability and died within two years of the final determination of his total disability. This amendment became effective on 15 July 1983 and is of no avail to plaintiff since her claim is controlled by the version of G.S. 97-38 in force at the time of her husband's death. 1983 N.C. Sess. Laws, ch. 772, s. 2.

Reversed and remanded.

Judges WEBB and HILL concur.

DURHAM SHOPPING CENTER, INC. v. ORCO, INC., T/A BAMBINO'S OF
NORTH CAROLINA AT LAKEWOOD SHOPPING CENTER, ET AL. AND ED-
WARD S. ORGAIN, JR. v. MILTON ANDREWS

No. 8414SC239

(Filed 4 December 1984)

**1. Guaranty § 2— lease agreement—subsequent assignments but no new lease—
reduction in rent—guarantor liable**

In an action to recover unpaid rent from a lessee and the lessee's guarantor, the trial court did not err in holding the guarantor liable where the original lessee had been acquired by another company, which assigned the lease to a third party, and the trial court's finding that no lease had been executed other than the original lease was supported by testimony from plaintiff's president and the absence of any other written lease. An agreement by plaintiff to reduce the lease payments did not injure and therefore did not discharge the guarantor.

2. Guaranty § 2— action on lease guaranty—within statute of limitations

Where defendant guaranteed an entire lease and the guaranty agreement provided for defendant's liability 20 days after plaintiff gave notice of its intent to declare a default, plaintiff had the right to sue on the entire lease once it became apparent that the principal would make no more payments and an action commenced within three years of the last payment and notice to defendant of liability was within the statute of limitations.

**3. Guaranty § 2— no unreasonable delay in demanding payment—supported by
evidence**

In an action against a guarantor on a lease, the trial court's conclusion that plaintiff had not unreasonably delayed in demanding payment or in bring-

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ing suit was supported by findings that defendant was reminded many times of the arrearages and his responsibility as a guarantor, and that plaintiff had made repeated demands for payment of back rent. Those findings were supported by testimony from plaintiff's president.

APPEAL by defendant Orgain from *Barnette, Judge*. Judgment entered 30 September 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 November 1984.

Plaintiff lessor brought this action to recover unpaid rent from defendant lessee ORCO, Inc., and from ORCO's guarantors on the lease, Edward S. Orgain, Jr., and Joseph N. Cohn. Cohn was not served and therefore is not a party to this action. Plaintiff obtained entry of default against defendant ORCO after ORCO failed to answer. Defendant Orgain (hereinafter, defendant) filed a third party complaint against Milton Andrews. After entry of partial summary judgment in defendant's favor as to part of the damages alleged by plaintiff, the case was tried by Judge Barnette, who sat without a jury.

Judge Barnette's findings of fact are summarized as follows: Plaintiff executed a lease to ORCO on 2 November 1971 for a ten year term running from the beginning of November 1971 to the end of October 1981. The lease provided that ORCO was to pay \$700 per month in rent, plus \$50 per month in maintenance fees, for the use of certain commercial property. Also on 2 November 1971 defendant executed a "Guarantee of Lease" in which he agreed to pay deficiencies or damages resulting from ORCO's default "at any time during the term of said lease."

Bambino's International, Inc., acquired all of ORCO's stock in April 1973. From April 1973 to March 1977 Bambino's operated the premises that ORCO had leased from plaintiff. In March 1977 the lease was assigned to Milton Andrews, who thereafter operated the leased premises. Plaintiff was not a party to any assignment of the lease and never consented to assignment of the lease. A new lease was never negotiated during the term of the original lease. Plaintiff's agent did agree with Andrews on 1 December 1978 to reduce the monthly lease payment owed by ORCO to \$625.

Defendant received numerous notices throughout the term of the lease reminding him of arrearages and his responsibility as

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guarantor. ORCO owed \$22,800 to plaintiff pursuant to the lease at the time of trial, and Andrews owed \$6,350 to ORCO under the oral assignment of lease to him.

Judge Barnette concluded from these findings that plaintiff was entitled to recover \$22,800 from ORCO and from defendant as ORCO's guarantor. Defendant was entitled to recover \$6,350 from Andrews. Further conclusions of law stated that the assignment of lease from ORCO to Andrews violated the terms of the assignment clause in the lease. The reduction in rent beginning 1 December 1978 was not injurious to defendant as guarantor, and the consequent reduction in his liability was accounted for in computing the \$22,800 judgment. Defendant guaranteed payment over a period of time, so no statute of limitations barred plaintiff's claim. Nor was there any unreasonable delay by plaintiff in demanding payment or bringing suit.

Judgment was entered for defendant in the amount of \$6,350 on his third party complaint against Andrews. Defendant appealed from judgment for plaintiff in the amount of \$22,800.

William R. Winders and William J. Thomas, II, for plaintiff, appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Martha Jones Mason, for defendant, appellant Edward S. Orgain, Jr.

HEDRICK, Judge.

[1] Defendant contends the trial court erred in holding him liable under the guaranty since the lease he guaranteed was either superseded by other leases or materially altered in its terms. Defendant argues that the greater weight of the evidence shows that plaintiff entered into lease agreements with Bambino's International, Inc., or Andrews, thereby discharging defendant's liability as guarantor. This argument does not present an issue for review as the trial court's findings are conclusive on appeal when supported by any competent evidence. The trial court found that no lease had been executed except the original lease between ORCO and plaintiff. Testimony from plaintiff's president and the absence of any other written leases supported this finding. Thus,

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there is no basis for defendant to claim on appeal that his liability was discharged by plaintiff entering new leases.

Nor was the lease altered in any manner that would discharge defendant as guarantor. Normally a surety is discharged where there has been an agreement among the other parties injuriously affecting the surety's rights or liabilities. *Deal v. Cochran*, 66 N.C. 269 (1872). However, in the present case defendant was benefitted rather than injured by plaintiff's agreement to reduce the lease payments after 1 December 1978. The controlling principle is stated in *Crouse v. Stanley*, 199 N.C. 186, 188-89, 154 S.E. 40, 41 (1930): "This Court has adopted the *pro tanto* theory; that is to say . . . the surety in obedience to equitable principles is discharged and relieved to the extent of the loss actually suffered and no further." The trial court properly reduced defendant's liability under the guaranty in accordance with the rent reduction agreement and no further.

[2] Defendant contends the trial court erred in concluding that the guaranty was a "continuing" guaranty for which the statute of limitations did not begin to run until the last rental payment on 11 May 1981. We disagree. "In North Carolina a plaintiff's cause of action against a guarantor arises when the principal refuses to make further payments on the promissory note." *Advertising, Inc. v. Peace*, 43 N.C. App. 534, 536, 259 S.E. 2d 359, 360 (1979), *disc. rev. denied*, 299 N.C. 328, 265 S.E. 2d 393 (1980). The same reasoning applies by analogy to a guarantor of a lease for a term of years: the statute of limitations begins to run from the date of the last payment or other event triggering the guarantor's liability on the entire lease. The present guaranty agreement provided for defendant's liability twenty days after plaintiff gave notice of its intent to declare default. Plaintiff gave such notice to defendant on 14 July 1981, and the complaint was filed on 18 November 1981. The action thus commenced well within three years of ORCO's last payment and notice to defendant of his liability. Defendant guaranteed the entire lease, and therefore plaintiff had the right to sue for the entire amount owed, as in *Advertising, Inc.*, *supra*, once it became apparent that the principal would make no more payments.

[3] Defendant last contends the trial court erred in concluding that plaintiff did not unreasonably delay in demanding payment of

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him or in bringing suit. The trial court's conclusion was supported by its findings that defendant was reminded many times of the arrearages and his responsibility as guarantor. Moreover, plaintiff made repeated demands for payment of back rent. Testimony from plaintiff's president supported these findings. The trial court's findings and conclusion that there was no unreasonable delay thus are conclusive on appeal.

Affirmed.

Judges WEBB and HILL concur.

LURA S. SMITH v. MONSANTO COMPANY AND MONSANTO NORTH CAROLINA, INC.

EDITH B. JOHNSON v. MONSANTO COMPANY AND MONSANTO NORTH CAROLINA, INC.

No. 8412SC338

(Filed 4 December 1984)

Master and Servant § 10— employment at will—layoff with possibility of recall— failure to recall not breach of contract—no equitable estoppel

Where plaintiffs' employment was terminable at will, defendant employer allowed plaintiffs, pursuant to company policy, to choose between termination with severance pay or layoff with the possibility of recall for one year, and plaintiffs chose a layoff with the possibility of recall, plaintiffs had no contractual right to recall, and defendant employer did not breach its employment contract with plaintiffs when it allegedly hired independent contractors and temporary workers rather than recall plaintiffs. Furthermore, defendant employer was not equitably estopped from defending plaintiffs' action on the ground that the employment contracts were terminable at will since plaintiffs had no right to severance pay which they might have been deceived into surrendering and plaintiffs failed to show any deception on the part of defendant.

APPEAL by plaintiffs from *Bowen, Judge*. Judgments entered 24 October 1983, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 29 November 1984.

Plaintiffs brought this action to recover for alleged breach of contract, gross negligence, fraud, and unfair or deceptive trade practices resulting from their termination as defendant's em-

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ployees. Defendant hired plaintiffs in 1978 to work at its Fayetteville plant. The parties did not enter into written employment contracts, and the term of employment was indefinite.

In 1979 defendant distributed a booklet to plaintiffs and other employees explaining its employment policies. The booklet stated with regard to reduction in work force that, "Employees will be retained in the plant in order of their plant seniority, provided they are capable of performing the remaining open jobs available in the plant." It also provided for rehiring of voluntary layoffs according to seniority. The booklet made no mention of severance pay.

Defendant decided to reduce its work force at the Fayetteville plant due to its withdrawal from the filament polyester market. Part of the plant was sold to another company and the remainder was converted to produce an agricultural chemical instead of polyester. Plaintiffs were among the employees subject to reduction in force. On 12 March 1981 they attended an exit interview where defendant gave them the option of either taking two weeks severance pay and terminating their employment or accepting layoff status with the possibility of recall during the next year. Plaintiffs chose the latter option. Plaintiffs were never recalled and on 12 March 1982 defendant terminated their employment.

Plaintiffs maintained that their recall rights were violated when defendant hired independent contractors and temporary workers from employment agencies between 12 March 1981 and 12 March 1982 rather than recall them. The trial court granted summary judgment for defendant on all claims. Plaintiffs appealed.

Carter & Melvin, by Stephen R. Melvin and Lester G. Carter, Jr., for plaintiff, appellants.

Smith, Moore, Smith, Schell & Hunter, by Martin N. Erwin and Michael A. Gilles, for defendant, appellee.

HEDRICK, Judge.

Plaintiffs contend the trial court erred in granting summary judgment for the defendant because a genuine issue of material

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fact exists as to whether defendant breached its contracts of employment with them. The employment contracts lacked a definite term and therefore were terminable at the will of either party. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). Plaintiffs' forecast of evidence indicates that defendant had a company policy, applicable to them, of providing employees subject to reduction in force with a choice between termination with severance pay or layoff with the possibility of recall for one year. Pursuant to company policy, defendant allowed plaintiffs to choose between termination and layoff. However, there is no evidence that plaintiffs contracted with defendant for the right to either termination with severance pay or layoff with the possibility of recall. This choice was a gratuitous benefit defendant conferred on plaintiffs after the parties had agreed on employment contracts which were terminable at will. This Court has previously held in similar circumstances that an employee has no contractual right on which to base a claim: "Defendant's personnel policies, which were amended after plaintiff was hired, were not expressly incorporated in plaintiff's contract, and without such inclusion defendant was not obligated to follow its personnel policies in dismissing plaintiff." *Griffin v. Housing Authority*, 62 N.C. App. 556, 557, 303 S.E. 2d 200, 201 (1983). Thus plaintiffs had no right to recall and we need not decide if they presented evidence that defendant failed to recall them when it could have done so.

Plaintiffs also contend summary judgment was improper because their forecast of evidence tended to show that defendant should have been equitably estopped from defending on the basis that the contracts were terminable at will. In effect, plaintiffs argue that they surrendered their right to severance pay in response to defendant's deceiving statement that they might be recalled. Yet, as previously discussed, plaintiffs had no "right" to severance pay which they might have been deceived into surrendering. The employment contracts remained terminable at will, so plaintiffs never were deprived of any right. Finally, they have failed to show any evidence of deception on the part of the defendant. Plaintiffs freely made the choice between severance pay and layoff. Defendant offered only the *possibility* of recall based on seniority, and there was no evidence that laid off workers less senior than plaintiffs were recalled. Thus, the doc-

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trine of equitable estoppel has no application to this case. See *Hawkins v. Finance Corp.*, 238 N.C. 174, 177-78, 77 S.E. 2d 669, 672 (1953).

Affirmed.

Judges WEBB and HILL concur.

DAVID E. LOFTON v. ETHEL LOFTON

No. 848DC258

(Filed 4 December 1984)

Divorce and Alimony § 30—dismissal of equitable distribution—premature

In an action for absolute divorce, the trial court lacked authority to consider and grant plaintiff's motions to strike and dismiss defendant's counterclaim for equitable distribution where the record contained no judgment of absolute divorce or any indication that such a judgment had ever been entered. Equitable distribution may not precede a decree of absolute divorce. G.S. 50-21(a) (Supp. 1983).

APPEAL by defendant from *Jones, Arnold, Judge*. Order entered 8 November 1983 in WAYNE County District Court. Heard in the Court of Appeals 15 November 1984.

Plaintiff husband, a retired military man, filed an action for an absolute divorce on 14 July 1983. Defendant wife answered and counterclaimed for equitable distribution, seeking at least 40% of plaintiff's annual military retirement pension. Pleading a prior judgment in an alimony action as a bar, plaintiff moved to dismiss and/or strike defendant's counterclaim. The trial court found that the prior judgment in the alimony action was a properly settlement which precluded any equitable distribution. The court granted plaintiff's motions to strike and dismiss defendant's counterclaim and defendant appealed.

Braswell, Taylor & Brantley, by Roland C. Braswell, for plaintiff.

Paul Jones for defendant.

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WELLS, Judge.

The Equitable Distribution Act specifically provides that where a divorce action and an application for equitable distribution are pending, "[t]he equitable distribution may not precede a decree of absolute divorce." N.C. Gen. Stat. § 50-21(a) (Supp. 1983). "Upon application of a party to an action for divorce, an equitable distribution of property shall follow a decree of absolute divorce." *Id.* The record in this case does not contain any judgment of absolute divorce, nor any indication that such a judgment ever has been entered in North Carolina or elsewhere.

On the present record, the trial court's dismissal of defendant's equitable distribution claim was premature. The trial court lacked authority to consider or grant plaintiff's motions. The order appealed from is therefore

Vacated.

Judges ARNOLD and BECTON concur.

FRED M. UPDIKE v. MARGRIT DAY

No. 8428SC582

(Filed 4 December 1984)

Appeal and Error § 6.1— motion to dismiss—absence of proper service—denial not immediately appealable

An order denying defendant's motion to dismiss for plaintiff's failure to obtain proper service of process was not immediately appealable. G.S. 1-277(b).

APPEAL by defendant from *Sitton, Judge*. Order entered 8 March 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 25 October 1984.

This is an appeal from the denial of defendant's motion to dismiss for plaintiff's failure to obtain proper service of process.

C. David Gantt, P.A., for plaintiff appellee.

Herbert L. Hyde and G. Edison Hill, for defendant appellant.

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VAUGHN, Chief Judge.

The appeal must be dismissed as interlocutory.

G.S. 1-277(b) provides that an interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the Court over the person or property of defendant. The Supreme Court of North Carolina has held, however, that challenges to sufficiency of process and service do not concern the State's power to bring a defendant before its courts for trial; instead, they concern the means by which a court gives notice to a defendant and asserts jurisdiction over him. "G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. . . . [I]f the court has the jurisdictional power to require that the party defend and the challenge is merely to the process of service used to bring the party before the court, G.S. 1-277(b) does not apply." *Love v. Moore*, 305 N.C. 575, 580, 291 S.E. 2d 141, 145 (1982). "Allowing an immediate appeal only for 'minimum contacts' jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than 'minimum contacts' with this state will never be forced to trial against their wishes." *Id.* at 581, 291 S.E. 2d at 146.

In accordance with the mandate in *Love*, we must dismiss the appeal *ex mero motu*.

Appeal dismissed.

Judges BRASWELL and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 DECEMBER 1984

CANAL INS. CO. v. WESTMORELAND No. 8421DC129	Forsyth (82CVD3379)	Reversed & Remanded
E & J INVESTMENTS v. CITY OF FAYETTEVILLE No. 8412SC122	Cumberland (82CVS2209)	Affirmed
FOWLER v. FOWLER No. 8421DC141	Forsyth (80CVD2255)	Affirmed(d)
GOFORTH & WILSON v. HARTFORD INS. No. 8424DC278	Mitchell (81CVD99)	Reversed
HELMS v. GRIFFIN No. 8420SC183	Union (82CVS281)	Affirmed
HICKS v. NC DEPT. OF CORRECTIONS No. 843SC251	Pitt (82CVS948)	Affirmed
HUGHES v. HUGHES No. 8428DC103	Buncombe (82CVS1739)	Dismissed
IN RE McPETERS No. 8429DC27	McDowell (81J61) (81J62)	Affirmed
LOWE v. LOWE No. 8418DC691	Guilford (84CVD155)	Dismissed
NC BAPTIST HOSPITALS v. HARRIS No. 8423DC246	Yadkin (83CVD151)	Reversed & Remanded
ROBERSON v. ROBERSON No. 8428DC488	Buncombe (81CVD2085)	No Error
STANSBERRY v. CONRAD INDUSTRIES No. 8424SC356	Yancey (83CVS15)	Affirmed
STATE v. CULVERHOUSE No. 8321SC1313	Forsyth (83CR26954)	Affirmed
STATE v. DUNCAN No. 8426SC179	Mecklenburg (83CRS018602) (83CRS019046)	No Error

STATE v. JOHNSON No. 8422SC178	Davidson (82CR15698) (82CR15699)	Affirmed
STATE v. McKINNEY No. 8421SC654	Forsyth (83CRS59015)	No Error
STATE v. MOORE No. 849SC131	Vance (83CRS1097)	No Error
STATE v. PLANTER No. 8426SC679	Mecklenburg (84CRS12015)	New Trial
STATE v. SMITH No. 8422SC657	Iredell (83CRS8313)	No Error
STATE v. WILLIAMS No. 843SC667	Pitt (83CRS9268)	No Error
STATE <i>EX REL.</i> GILCHRIST v. ATHANS No. 8426SC176	Mecklenburg (83CVS2694)	Affirmed
TOWN OF NAGS HEAD v. TILLET No. 831SC789	Dare (82CVS120)	Affirmed
VALENTINE v. TURBYFILL No. 8429SC270	Transylvania (81CVS411) (81CVS412) (81CVS413)	Affirmed

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WILLIAM L. HIGDON AND WIFE, JANE A. HIGDON v. KENNETH LARRY DAVIS AND WIFE, JENCY L. DAVIS

No. 8330SC1337

(Filed 18 December 1984)

1. Adverse Possession § 17.1; Deeds § 15.1— defeasible fee—reversion to grantors—subsequent conveyances as color of title

Where a deed conveying a driveway easement required, as consideration for the grant of the easement, that the grantee and his heirs and assigns "shall always maintain an all weather drive over said right-of-way" and provided that, if they fail to do so, "this deed shall be null and void and the rights hereby conveyed shall revert" to the grantors, the title to the easement reverted to the grantors when no driveway had been built and maintained in an all weather condition for seventeen years after the original conveyance, and subsequent conveyances of the easement by deed constituted color of title to the easement.

2. Adverse Possession § 19; Easements § 6— doctrine of color of title—applicability to prescriptive easements

The doctrine of color of title is applicable to acquisition of title to an easement by prescription so that one can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to G.S. 1-38.

3. Easements § 6.1— easement by prescription—hostile use or use under claim of right

Plaintiffs' evidence was sufficient for the jury to find that use of a driveway easement was adverse, hostile or under a claim of right rather than permissive where it tended to show that defendants and their immediate predecessors in title used the easement under a claim of right contained in deeds to them although owners of a servient estate attempted on various occasions to block the easement and prevent its use.

4. Easements § 6.1— prescriptive easement—open and notorious use

The evidence was sufficient for the jury to find that use of a driveway easement was open and notorious where it tended to show that defendants' use of the easement was under a claim of right in a deed, that plaintiffs and their predecessors in title had record notice of the easement, and that plaintiffs and their predecessors had attempted to block use of the easement on various occasions.

5. Adverse Possession § 6; Easements § 6— prescriptive easement—color of title—tacking of successive adverse possessions

Successive adverse users in privity with prior adverse users can "tack" successive adverse possessions of land so as to aggregate the prescriptive period for an easement by prescription under color of title. Therefore, there was sufficient evidence from which the jury could find that adverse use of a driveway easement was continuous and uninterrupted for the prescriptive

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period of seven years under color of title where the evidence tended to show that defendants and their immediate predecessors in title used the easement for ingress to and egress from the dominant estate from February 1971 until July 1980.

6. Easements § 6.1— prescriptive easement—substantial identity

There was substantial identity of a right-of-way easement where the evidence tended to show that the easement enjoyed by defendants was the same easement granted in the original right-of-way deed, there was evidence from two surveyors as to the actual location of the easement upon the ground, and defendants offered evidence that they had paved a driveway within the confines of the easement.

7. Appeal and Error § 32— submission of issue—absence of objection—failure to include instruction in record on appeal

The appellate court will not consider an assignment of error that the trial court erred in submitting to the jury an issue of adverse possession of an easement under color of title for seven years where there was no objection at trial to the submission of this issue and the court's instructions to the jury are not in the record on appeal.

8. Deeds §§ 8.1, 9— sufficiency of consideration for deed

The bare assertions of two grantors of a right-of-way deed that they did not receive money and the assertion of a witness that her husband did not receive money was insufficient to rebut the presumption of consideration arising from the recitation in the deed that it was given "in consideration of the sum of One Dollar to them in hand paid, and other valuable consideration, receipt of which is hereby acknowledged," since there were other grantors not testifying who could have received monetary consideration. Furthermore, a promise in the deed by the grantees to construct and maintain an all weather driveway in the right-of-way constituted sufficient consideration for the deed so that it was not a deed of gift.

9. Easements § 7.2— issue as to location of easement

Where a court-appointed surveyor and a surveyor for defendants offered conflicting testimony as to the actual location of an easement, the trial court erred in failing to submit to the jury an issue tendered by plaintiffs as to which location was the correct one.

10. Costs § 4— surveyor's fees as part of costs

Fees for a court-appointed surveyor are required by G.S. 38-4(d) to be taxed as part of the costs, and where the judgment of the trial court taxed the costs to plaintiffs, the plaintiffs must pay the surveyor's fees although no specific award of surveyor's fees was included in the judgment.

APPEAL by plaintiffs from *Cornelius, Judge*. Judgment entered 5 August 1983 in Superior Court, MACON County. Heard in the Court of Appeals 28 September 1984.

This is an action to quiet title in which plaintiffs, William L. and Jane A. Higdon, alleged in their complaint filed 29 July 1980

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that they were owners of certain land located in Macon County in which defendants, Kenneth L. and Jency L. Davis, claimed an easement adverse to plaintiffs' title. Plaintiffs requested that defendants' claim be determined and title quieted in plaintiffs.

The evidence at trial tends to show that plaintiffs and defendants hold title to their respective lands from a common source. By right-of-way deed dated 14 June 1948, plaintiffs' predecessor in title, Hallie C. Cozad, widow, and others, conveyed to defendants' predecessor in title, R. D. Rogers, an easement for a 12' wide roadway across plaintiffs' predecessors' lands.

In the right-of-way deed immediately following the description of the easement, the following appears:

This right of way is given to the party of the second part [defendant's predecessor in title] for the purpose of constructing a graveled driveway to the property of party of the second part, and the parties of the first part [plaintiff's predecessor in title] reserve unto themselves, their heirs and assigns, the right in common with party of the second part, to use said right of way for ingress and egress to their property . . .

The consideration for which this right of way deed is made is that party of the second part, his heirs and assigns, shall always maintain an all weather drive over said right of way and should they fail to do so this deed shall be null and void and the rights hereby conveyed shall revert to parties of the first part, their heirs and assigns.

The easement for a driveway and the conditions associated with it have been passed by deed along defendants' chain of title. The land and the easement were deeded to defendants by their immediate predecessor in title on 5 January 1976.

The owners and the dates they took title in defendants' chain of title are listed in reverse order as follows:

Emmerson G. and Marjorie H. Crawford—10 February 1971

L. C. and Frances Higdon—8 September 1965

Marshall and Freddie McElroy—19 August 1965

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W. G. and Avis Hall—21 July 1948

R. D. and Ellen Rogers—21 May 1946

R. D. and Ellen Rogers received title to the easement by right-of-way deed dated 14 June 1948. This right-of-way deed was not registered until 10 June 1959.

There was conflicting testimony at trial as to whether defendants and their predecessors in title had constructed a gravel driveway within a reasonable time and whether there always had been maintained an all weather driveway as required by conditions in the right-of-way deed. There was also conflicting evidence as to the easement's actual location on the ground.

The case was tried before a jury which answered the issues submitted as follows:

1. Did the Defendants and their predecessors in title fail to construct within a reasonable time a driveway, and thereafter, fail to always maintain the same in an all-weather condition, as contemplated in the easement deed from Hallie C. Cozad and others to R. D. Rogers dated June 14, 1948?

The jury answered this issue "yes."

2. Have Defendants and their predecessors in title acquired an easement over the land of the Plaintiffs by adverse use of the road . . . for a period of 20 years before this action was filed on July 29, 1980?

The jury answered this issue "no."

3. Did Defendants and their predecessors in title acquire an easement over the land of the Plaintiffs by adverse use of the road . . . for a period of 7 years under the easement deed from R. D. Rogers and wife to W. G. Hall and wife?

The jury answered this issue "yes."

Plaintiffs appeal. Defendants cross appeal assigning as error the denial of defendants' motion for directed verdict and judgment notwithstanding the verdict concerning the issue of the defeasance language in the easement deed from Hallie C. Cozad and others to R. D. Rogers, dated 14 June 1948.

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Coward, Coward, Dillard and Cabler, by Orville D. Coward, Jr., for plaintiff-appellants.

Jones, Key, Melvin and Paton, by R. S. Jones, Jr. for defendant-appellants.

EAGLES, Judge.

I

This case presents an issue of first impression; whether one can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to G.S. 1-38. The jury answered this issue in the affirmative and plaintiffs assign as error the trial court's refusal to grant a directed verdict or judgment notwithstanding the verdict on this issue. For the reasons herein stated, we find no error in the trial court's refusal to grant plaintiffs' motions.

A. APPLICABILITY OF COLOR OF TITLE TO PRESCRIPTIVE EASEMENTS.

[1] In determining whether the doctrine of color of title pursuant to G.S. 1-38 can be applied in any case, we first consider whether "color of title" is actually present. Color of title is generally defined as a written instrument which purports to convey the land described in the written instrument, but fails to do so because of:

1. Want of title in the Grantor, or
2. Some defect in the mode of conveyance.

Price v. Tomrich Corp., 275 N.C. 385, 167 S.E. 2d 766 (1969). If these defects do not exist, title is actually passed by the instrument and there can be no color of title.

As applied to this case, the evidence at trial tended to show that Emmerson G. Crawford and wife transferred by general warranty deed to defendants certain land identified by a metes and bounds description. In addition to the metes and bounds description, the deed contains the following language:

Parties of the first part [Crawfords] further convey to parties of the second part [defendants], their heirs and assigns, an

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easement for a roadway 12 feet in width, the South Margin of which runs as follows: Beginning on an iron rod, said point being located North 5 degrees 30 minutes West 79.6 feet from the second and Southwest corner of the land described herein; runs thence South 85 degrees 10 minutes West 83 feet to the East margin of Porter Street.

This easement is a driveway that runs across plaintiffs' adjoining land to a city street. The Crawfords excepted the easement from the warranties contained in the deed, but nevertheless conveyed the easement on the face of the deed to defendants.

This easement described in the deed from the Crawfords to defendants is the same easement conveyed by the remaining deeds in defendants' chain of title. The three preceding deeds grant the easement by referring to the easement as it appears in the fourth preceding deed from R. D. Rogers and wife to W. G. Hall and wife. The language in the Rogers to Hall deed conveys the easement as follows:

Parties of the first part [Rogers] further convey to parties of the second part a right of way 12 feet wide over the following described land: BEGINNING at the Northwest corner of the Co-Jo Filling Station property on the East side of Porter Street in the Town of Franklin, running thence with the North line of said property in an Easterly direction to the West line of the land above described at the Northeast corner of the Co-Jo property; thence with the West line of the land above described in a Northerly direction 12 feet; thence in a Westerly direction parallel to the first line to the East margin of Porter Street; thence with the East margin of Porter Street in a Southerly direction 12 feet to the point of BEGINNING, being the right of way described in a deed from Hallie C. Cozad, widow, et al, to R. D. Rogers, dated June 14, 1948, and this deed is made subject to the conditions contained in said right of way deed.

The beginning deed for the easement in defendants' chain of title is a right-of-way deed from Hallie C. Cozad, widow, et al., to R. D. Rogers dated 14 June 1948. Mrs. Cozad is the common source of title to the lands of plaintiffs and defendants. The conditioning language in the right-of-way deed, which is specifically referred to in the deed from Rogers to Hall, requires, as con-

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sideration for the deed, that the grantee and his heirs and assigns "shall always maintain an all weather drive over said right-of-way." Should the original grantee or his heirs or assigns fail to maintain an all weather driveway, then the right-of-way deed "shall be null and void and the rights hereby conveyed shall revert [to the grantor]."

Plaintiffs argue that there can be no color of title based on the Rogers to Hall conveyance because there was no evidence that the Rogers lacked title to the easement at the time they conveyed it to the Halls. We agree but note that the Halls did not have good title to the easement when they conveyed the easement by deed on 19 August 1965 to Marshall and Freddie McElroy, defendants' predecessors in title. This absence of good title was due to the defeasance of the easement by reason of the Halls' failure to build a gravel driveway within a reasonable time and their failure to maintain the driveway in an all weather condition.

There was evidence at trial that tended to show that R. D. Rogers and wife held the property, which later became the dominant tract, from 21 May 1946 to 21 July 1948. The Rogers' property became the dominant tract when Hallie C. Cozad, widow, et al., conveyed to the Rogers a right-of-way deed for a driveway, subject to conditions, on 14 June 1948. On 21 July 1948, the Rogers conveyed the dominant tract to W. G. Hall and wife. The Halls owned the easement from 21 July 1948 to 19 August 1965, a period of 17 years. The Rogers owned the easement for less than a month.

While less than one month of ownership may not be a reasonable time within which to build and thereafter maintain a driveway in an all weather condition, 17 years of ownership is more than a reasonable time in which to complete the conditions called for in the right-of-way deed.

There was evidence at trial that the driveway had not been built and that the called-for driveway was not maintained in an all-weather condition during the period that the property and easement was owned by W. G. Hall and wife. This evidence was sufficient for the jury to conclude that the conditions in the right-of-way deed had not been met. For this reason, W. G. Hall and wife had no title to the easement to transfer to a subsequent

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grantee. The defeasance had operated during the Halls' ownership and the title to the easement had reverted to the grantors of the easement, their heirs and assigns. Any subsequent grant of the easement by deed is color of title to that easement.

When the description in a deed embraces not only the land owned by the grantor, but also contiguous land which he does not own, the instrument conveys the property to which the grantor had title and constitutes color of title to that portion which he does not own. *Lane v. Lane*, 255 N.C. 444, 121 S.E. 2d 893 (1961). Since the deeds subsequent to the ownership of the easement by W. G. Hall and wife purported to grant an easement in which the grantors had no title, we hold that there was sufficient evidence of color of title.

[2] Having found that color of title exists here, we next consider whether the doctrine of color of title is applicable to acquisition of title to an easement by prescription. We hold that it is applicable.

Several legal principles relating to easements by prescription have evolved in our appellate decisions:

(1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement. *Williams v. Foreman*, 238 N.C. 301, 77 S.E. 2d 499 (1953).

(2) The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. *Henry v. Farlow*, 238 N.C. 542, 78 S.E. 2d 244 (1953).

(3) The use must be adverse, hostile, and under a claim of right. *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966).

(4) The use must be open and notorious. *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912).

(5) The adverse use must be continuous and uninterrupted for a period of twenty years. *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946).

(6) There must be substantial identity of the easement claimed. *Hemphill v. Board of Aldermen*, 212 N.C. 185, 193 S.E. 153 (1937).

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Plaintiff argues that the prescriptive period for acquiring title to an easement is judge-made law and the correct prescriptive period is 20 years. *Speight v. Anderson, supra*; *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Plaintiff also argues correctly that this twenty-year prescriptive period is analogous to G.S. 1-40 which requires a twenty-year period for gaining title to real property under adverse possession.

It appears that our appellate decisions have not made a similar analogy to G.S. 1-38, the statute of limitations for adverse possession under seven years' color of title. Based on sound policy reasons, we hold that G.S. 1-38 is applicable to prescriptive easements.

Previous cases holding that the prescriptive period is twenty years did not definitively address the issue of color of title.

In *Adams v. Severt*, 40 N.C. App. 247, 252 S.E. 2d 276 (1976), this court had an opportunity to address the application of G.S. 1-38 to the acquisition of title to an easement. However, the reservation of an easement by deed in that case was ineffective. The description of the easement in the deed was insufficient to identify and locate it. This court held that where the reservation of an easement in a deed was ineffective, the claim of adverse possession of the easement under color of title pursuant to G.S. 1-38 was also ineffective.

The right-of-way easement deed here has no fatal defect such as appeared in *Adams v. Severt, supra*. The deeds in defendants' chain of title adequately describe and locate the easement and are sufficient to serve as color of title.

Generally, except in a few states in which the statutory period for acquiring title to real property is held *not* to apply (Tennessee, Florida and Utah), the period necessary for acquiring title to an easement by prescription is, by analogy, the period limited for the acquisition of title to land by adverse possession. Most of the adverse possession of realty statutes do not, by their terms, apply to prescriptive rights, but to the acquisition of corporeal hereditaments only. 28 C.J.S., Easements, Section 16 (1941 and Supp. 1984). (Alaska, Arizona, Kansas, Mississippi, New Mexico, New York, Pennsylvania, Texas and Washington.) The discussion of acquisition of easements by prescription in Hetrick's

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revision of *Webster's Real Estate Law in North Carolina*, states that by analogy, the statute of limitations applicable for acquiring title to land by adverse possession (G.S. 1-40) serves as the basis for presuming the grant of an easement. Hetrick, *Webster's Real Estate Law in North Carolina*, Section 318 (1981). If G.S. 1-40 is applicable by analogy as the prescriptive period for acquiring the grant of an easement, we find no compelling reason to refuse to apply G.S. 1-38 as a method to acquire the grant of an easement under color of title where it is shown to exist. Where one can acquire fee simple title to the greater interest under color of title pursuant to G.S. 1-38, common sense dictates that, in the absence of statutes to the contrary, one should also be able to acquire title to easements appurtenant to that interest in the same statutory period. To hold otherwise would require the grantee to wait twenty years to gain title to an easement he had bargained for in the deed from his grantor, when he would be required to wait only seven years for the real property itself, if the grantor had not in fact had title to convey. This is not logically consistent and would produce harsh results.

As applied here, G.S. 1-38 avoids a hardship where defendants were conveyed real property with an easement appurtenant and the grantor had title to the real property, but not the easement. Because the easement was conveyed in the deed and relied on by defendants, who then began to use the easement, and in fact paved a driveway over it, color of title should operate to give defendants title to the easement. Defendants assert that this result is in line with the law of other states on the same issue.

While the law of other jurisdictions does not bind our appellate courts, opinions from other states can offer guidance. In *Warlick v. Rome Loan and Finance Company*, 194 Ga. 419, 22 S.E. 2d 61 (1942) the Georgia Supreme Court held:

Where other elements of prescription are present, adverse possession, under written evidence of title, for seven years, shall give title by prescription . . . This provision of law applies in a like manner to easements. 194 Ga. at 421, 22 S.E. 2d at 63.

In *Georgia Power Company v. Gibson*, 226 Ga. 165, 173 S.E. 2d 217 (1970) Georgia Power Company alleged adverse possession of a prescriptive easement for more than twenty years or adverse

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possession under color of title for seven years. The Georgia Supreme Court again held that prescriptive title to an easement is governed by the same rules as prescriptive title to land. It further held that the deed in question supported possession of the easement for seven years under color of title. 226 Ga. at 165, 173 S.E. 2d at 218. The Georgia cases stand for the proposition that an easement may be acquired by prescription in twenty years *unless* there is some color of title, in which case only seven years is required. *Smith v. Clay*, 239 Ga. 220, 236 S.E. 2d 346 (1977). We hold that by application of G.S. 1-40 (20 years' possession) and G.S. 1-38 (possession for seven years under color of title) that a similar rule applies to the acquisition of prescriptive easements in North Carolina. In those cases where the other elements of prescription are present, adverse possession of an easement under written color of title for seven years pursuant to G.S. 1-38 shall give title to the easement by prescription.

Having determined that G.S. 1-38 is applicable to prescriptive easements where all other elements of prescription are present, we next consider whether all of the elements of prescription are present here. We hold that they are.

(1) The use must be adverse, hostile or under a claim of right. *Dulin v. Faires, supra*.

[3] To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. There must be some evidence accompanying the use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E. 2d 897, 900 (1973).

As applied to the instant case, we note that the adverse use is under a claim of right contained in a deed from defendants' grantors. Further, there was evidence at trial that tended to show that defendants and their immediate predecessors in title,

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the Crawfords, used the easement during their respective ownerships of the dominant tract from February 1971 until this action was filed on 29 July 1980 pursuant to the grant of the easement. There was further evidence from Emmerson G. Crawford and defendant Kenneth L. Davis that owners of the servient estate had attempted to block the easement and prevent its use. These attempted closings of the easement took place between 1971 and 1972 when the Linvilles owned the servient tract and again between 1976 and 1980 when plaintiffs owned the servient tract. Both Crawford and defendant Davis testified that they asserted their right to use the easement in question and continued to use it. This was sufficient evidence upon which a jury could find that the use of the easement was adverse, hostile or under a claim of right and not permissive.

(2) The use must be open and notorious. *Snowden v. Bell, supra*.

[4] The term adverse use or possession implies a use or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim. This may be proven by circumstances as well as by direct evidence. *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E. 2d at 900.

As applied here, evidence at trial tended to show an actual use of land under a claim of right contained in a deed. Further, plaintiffs and their predecessors in title had record notice of the easement. Evidence that there were attempts to block the easement is indicative that plaintiffs had notice and that the defendants' use of the easement was open and notorious.

(3) The adverse use must be continuous and uninterrupted for a period of twenty years, *Speight v. Anderson, supra*, unless there is written color of title, in which case the adverse use must be continuous and uninterrupted for a period of seven years.

[5] The continuity required is that the use be more or less frequent according to the nature of the easement. *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E. 2d at 900, 901.

As previously noted, the prescriptive period for acquiring an easement by prescription in North Carolina is now seven years where the claim is under color of title pursuant to G.S. 1-38.

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The burden is on defendants to show that they used the easement more or less frequently according to the nature of the easement and that they used the easement for seven years. Defendants have done so.

There was evidence at trial that tended to show that Emmer-son G. Crawford and wife became owners of the dominant tract in February 1971. Defendants became owners of this same dominant tract, by deed from the Crawfords as grantors, in January of 1976. This action was brought in July of 1980. *Trust Co. v. Miller*, 243 N.C. 1, 89 S.E. 2d 765 (1955), holds that one who has color of title can "tack" his possession with successive possessions for the purpose of showing a continuous adverse possession for seven years under color of title because there is privity of estate. It is also true in North Carolina that successive adverse users in privity with prior adverse users can "tack" successive adverse possessions of land so as to aggregate the prescriptive period for an easement by prescription. *Dickinson v. Pake*, 284 N.C. at 585, 201 S.E. 2d at 903; Hetrick, *Webster's Real Estate Law in North Carolina*, Section 322 (1981). Since the doctrine of tacking applies to the acquisition of easements as well as to adverse possession of land generally, it is clear that defendants here had at least seven years continuous and uninterrupted use of the easement between February 1971 and July 1980.

It should be noted that the Crawfords' possession under their deed from L. C. Higdon and wife did not amount to possession for seven years. However, when the defendants' possession is "tacked" onto the Crawfords' period of possession, the requirement of seven years' possession is met.

At trial there was evidence to show that in addition to the required seven years' possession the easement was used for ingress and egress to the dominant estate. The easement was for a driveway and it was to that use that the easement was put.

From the record we conclude that there was sufficient evidence from which the jury could find that the adverse use of the easement was continuous and uninterrupted for the prescriptive period of seven years under color of title.

(4) There must be substantial identity of the easement claimed. *Hemphill v. Board of Aldermen*, *supra*.

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[6] This rule contemplates a definite and specific line to which the user of the easement is confined. There may be slight deviations in the line of travel but there must be substantial identity of the easement enjoyed. *Dickinson v. Pake*, 284 N.C. at 581, 201 S.E. 2d at 901.

There was evidence at trial that tended to show that the easement enjoyed by defendants was the same easement granted in the original right-of-way deed. Further, there was evidence from two surveyors as to the actual location of the easement upon the ground. The testimony of the two surveyors conflicted somewhat creating an issue of fact for the jury, as discussed *infra*. Defendant Kenneth L. Davis also offered evidence that he had paved a driveway within the confines of the easement. This was sufficient evidence from which the jury could find that there was substantial identity of the easement claimed.

B. PLAINTIFFS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

A motion for directed verdict raises the question as to whether there is sufficient evidence to go to the jury. The standard to be applied is that when the evidence is taken as true and considered in the light most favorable to the non-movants, a directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the non-movant. *Younts v. Insurance Company*, 281 N.C. 582, 189 S.E. 2d 137 (1972); *Dickinson v. Pake*, *supra*.

When so viewed, defendants' evidence tends to show and would permit but not compel a jury to find that:

(1) Defendants and their predecessors in title, the Crawfords, used the easement described in the deed in question for the purpose of a driveway from February 1971 until July 1980.

(2) The use of the easement commenced before plaintiffs acquired the servient estate and was continued under such circumstances as to give plaintiffs notice that the use was adverse, hostile and under a claim of right.

(3) The use was open and notorious and with plaintiffs' full knowledge.

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This evidence was sufficient to rebut the presumption that the use was permissive and was sufficient to carry the issue to the jury. The trial court properly denied plaintiffs' motion for directed verdict. *Dickinson v. Pake, supra*.

The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as a motion for a directed verdict. Consequently, since the evidence offered by defendants in this case as to adverse possession of the easement under seven years' color of title was sufficient to withstand plaintiffs' motion for directed verdict at the close of all the evidence, the trial court properly denied plaintiffs' motion for judgment notwithstanding the verdict. *Dickinson v. Pake, supra*.

II

[7] Plaintiffs next argue that the trial court erred as a matter of law in submitting the issue of adverse possession of an easement under seven years' color of title to the jury.

We note that the record does not disclose an objection to the submission of this issue to the jury at the trial of this action. Rule 10(b)(2), Rules of Appellate Procedure, prohibits a party from assigning as error any portion of the jury charge or omission unless an objection was made before the jury retires to consider its verdict. If the trial court properly charged on this issue, plaintiffs may not be heard to complain now on appeal. We note that the jury instructions are not in the record, further undermining plaintiffs' right to complain on appeal.

As to the framing of issues put to the jury, we note:

A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. *Baker v. Construction Corp.*, 255 N.C. 302, 307, 121 S.E. 2d 731, 735 (1961).

The record before us shows no jury instructions and no objection by the plaintiffs to the issue submitted to the jury concerning acquisition of a prescriptive easement under seven years'

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color of title. For this reason, we do not consider this assignment of error.

III

[8] Plaintiffs next assign as error the trial court's directed verdict against plaintiffs on the issue of a deed of gift which is void if not proved and registered within two years after its making and the exclusion of a documentary exhibit and certain testimony of two witnesses. We find no error.

The basis of plaintiffs' argument is that the right-of-way deed from Hallie C. Cozad, widow, et al., to R. D. Rogers was a deed of gift that became void when it was not registered within two years of its making on 14 June 1948.

G.S. 47-26 provides:

All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration.

If consideration has been paid for the deed, it is not a deed of gift and its recordation is necessary only as against purchasers for value and lien creditors. A deed of gift is, of course, valid as to the parties and their heirs and assigns. Hetrick, *Webster's Real Estate Law in North Carolina*, Section 381 (1981).

As applied here, plaintiffs' assignment of error requires a determination of whether there was consideration given for the grant of the right-of-way deed. We hold that there was adequate consideration and that the right-of-way deed was not a deed of gift.

There must be some value given by the grantee to the grantor in return for the deed to prevent its being a deed of gift. The grantee must give to the grantor "some legal rights . . . to which the grantor would not otherwise have been entitled."

The right-of-way deed from Hallie C. Cozad, widow, et al., to R. D. Rogers dated 14 June 1948 contains the following language:

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WITNESSETH; That for and in consideration of the sum of One Dollar to them in hand paid, and other valuable consideration, receipt of which is hereby acknowledged . . .

Where a deed recites the payment and receipt of a consideration, it is presumed to be correct and is prima facie evidence of that fact. *Pelaez v. Pelaez*, 16 N.C. App. 604, 192 S.E. 2d 651 (1972), cert. denied 282 N.C. 582, 193 S.E. 2d 745 (1973); *Speller v. Speller*, 273 N.C. 340, 159 S.E. 2d 894 (1968). However, it is also true that this presumption of consideration may be rebutted by parol evidence. *Westmoreland v. Lowe*, 225 N.C. 553, 35 S.E. 2d 613 (1945).

Mrs. Mildred C. Brown, a grantor in the right-of-way deed from Hallie C. Cozad, widow, et al., to R. D. Rogers, testified that neither she nor her husband, also a grantor under the right-of-way deed, received any money as a result of the granting of the easement in question. John O. Wall, also a grantor under the right-of-way deed, testified that he had not received any money from the transfer of the easement.

The other grantors in the right-of-way deed did not testify. Hallie C. Cozad is 98 years old and confined to a nursing home, C. S. Brown, Jr. is an invalid and Margaret C. Wall is deceased. We hold that the bare assertions of two of the grantors that they did not receive money and the assertion of the witness Brown that her husband did not receive money is insufficient to rebut the presumption of the consideration recited as paid and received in the right-of-way deed since there were other grantors not testifying who could have received monetary consideration.

Plaintiffs argue that it was error to exclude the testimony of the witness Brown as to whether Hallie C. Cozad had ever received money for the transfer of the easement. The witness Brown testified that Hallie C. Cozad was her mother and that she had "looked after [Mrs. Cozad's] business since 1964." The witness attempted to testify that Hallie C. Cozad did not receive money but an objection was sustained.

We note that Hallie C. Cozad did not utilize Mrs. Brown to look after her business affairs from the date of the transfer of the easement, 14 June 1948, until sometime in 1964. This indicates that Mrs. Brown lacked opportunity to know whether Hallie C.

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Cozad had ever received money for the transfer of the easement. For this reason, the trial court did not err in refusing to admit this testimony.

Plaintiffs argue that it was error to exclude the testimony of the witness John O. Wall as to whether his wife, Margaret C. Wall, had received money for the transfer of the easement. No foundation was laid to show that the witness Wall had any personal knowledge as to whether his wife actually received any money. For this reason the trial court did not err in refusing to admit her testimony.

The right-of-way deed from Hallie C. Cozad, widow, et al., to R. D. Rogers, in addition to reciting the receipt of one dollar, also contains the following language indicating other valuable consideration:

The consideration for which this right of way deed is made is that party of the second part [grantee], his heirs and assigns, shall always maintain an all weather drive over said right of way . . .

The consideration recited is executory. There is a requirement of future maintenance which necessarily incorporates an implied-in-fact promise that grantee, his heirs and assigns will actually perform the maintenance required to keep the driveway in an all-weather condition.

There is consideration if the promisee [here the grantor] in return for the promise, does anything legal which he is not bound to do, whether there is any actual loss or detriment to him, or actual benefit to the promisor or not. *Foundation, Inc. v. Basnight*, 4 N.C. App. 652, 167 S.E. 2d 486 (1969). Hallie C. Cozad and others as grantors conveyed the right-of-way in exchange for the implied-in-fact promise to construct and maintain the right-of-way as required by the conditioning language of the deed. The implied-in-fact promise is the consideration for the right-of-way deed and is sufficient to support the trial court's directed verdict on the issue of deed of gift.

Plaintiffs offered into evidence an "affidavit" to the effect that the conditions in the right-of-way deed had not been complied with. The trial court properly refused to admit the exhibit.

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Plaintiffs argue that the "affidavit" was only offered as "corroboration" of the testimony of witnesses Brown and Wall on the issue of whether the conditions of the right-of-way deed were complied with.

We note that the application of the rules regulating the reception and exclusion of corroborative evidence, so as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court. *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953). Plaintiffs show no abuse of discretion by the trial court. Absent a showing of abuse of discretion, the trial court's ruling will be upheld on appeal.

Further, it appears to us that the "affidavit" is not relevant as to whether there was in fact consideration—an implied-in-fact promise—present in the instant case. Although the "affidavit" was not offered into proof at trial, plaintiffs purport to include it in the record on appeal. The "affidavit" shows nothing more than the conclusory statement that the implied-in-fact promise was breached. The "affidavit" does not show that the implied-in-fact promise was never made. For these reasons, the trial court did not err in refusing to admit the affidavit.

The evidence offered by plaintiffs was insufficient to support a verdict in plaintiffs' favor on the issue of a deed of gift. We hold that the trial court did not err in directing a verdict against plaintiffs on this issue.

IV

[9] Plaintiffs next assign as error the trial court's failure to submit to the jury issue number 1 of plaintiffs' tendered issues. We agree that there was error.

Issue number one of plaintiffs' tendered instructions reads:

1. Does the description in the right of way deed dated June 14, 1948 describe the green area, G, H, I, J, G or the red area, C, E, F, D, C?

The court-appointed surveyor and the surveyor for defendants offered conflicting testimony as to the actual location of the easement using a map identified as "Court's Exhibit." The two

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conflicting locations were shown on the map as a red rectangle and a green rectangle. The rectangles overlapped somewhat with the result being an approximate variance of four and a half feet along the common boundary between the lands of plaintiffs and defendants.

While either rectangle shows a substantial identity of the easement for purposes of acquiring an easement by prescription, a factual issue was presented that was properly for the jury to decide.

Defendants argue that by answering the issue in the affirmative as to possession under seven years' color of title, the jury found that the green rectangle showed the boundaries of the easement. We do not agree.

Had plaintiffs' issue number 1 been presented to the jury, the jury could have concluded that the easement was contained in the boundaries of the red rectangle. For this reason it was error to withhold this issue from the jury and a new trial must be had to determine only the location of the easement upon the ground.

V

[10] Plaintiffs next assign as error the trial court's omission from the judgment of an award of a fee to the court-appointed surveyor. The amount of the fee is \$475.00 and is not in dispute.

Defendants argue that G.S. 38-4(d) requires that fees for court-appointed surveyors be taxed as part of the costs. We agree.

The judgment of the trial court taxed costs to plaintiffs. For this reason it was unnecessary for the trial court to include an award of surveyor's fees in the judgment. Since the surveyor's fees are properly part of the costs pursuant to G.S. 38-4(d), plaintiffs must pay the surveyor's fees.

VI

Defendants cross assign as error the failure of the trial court to direct a verdict in defendants' favor or to grant defendants' motion for judgment notwithstanding the verdict concerning the defeasance language in the easement deed from Hallie C. Cozad, widow, et al., to R. D. Rogers, dated 14 June 1948.

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We note that our decision affirming the jury's verdict as to defendants' possession of the easement under seven years' color of title makes this assignment of error moot.

The judgment of the trial court is affirmed except as to that part of the judgment that locates the easement within the green lines on the court map which is reversed.

Because it was error for the trial court to refuse to submit plaintiffs' issue number 1 to the jury, we order a new trial to determine only the location of the easement upon the ground as being within the area marked by the green lines or within the area marked by the red lines on the court map.

Affirmed in part, reversed in part and remanded for a new trial.

Judges WEBB and WHICHARD concur.

LILLIE LEE JOHNSON, DECEASED; FRANK JOHNSON, EXECUTOR OF THE ESTATE OF DECEASED PLAINTIFF; FRANK JOHNSON INDIVIDUALLY; CALVIN JOHNSON AND WIFE, FRANCES R. JOHNSON; MAGGIE JOHNSON GARNER; MITTIE JOHNSON KIMBALL AND HUSBAND, EDWARD LEE KIMBALL; MINNIE JOHNSON STEELE AND HUSBAND, ALFRED STEELE; LOLA JOHNSON McDOWELL AND HUSBAND, NEAL McDOWELL; TED V. JOHNSON AND WIFE, FRANCES JOHNSON; JAMES D. JOHNSON AND WIFE, LELA JOHNSON; J. JUNIOR WARD AND WIFE, MARGIE WARD; AND DOROTHY JOHNSON BAITY v. CHARLES H. BROWN, SR., MANUS C. DUFFY AND FERNANDE BENNETT, TRUSTEES, AND BENEFICIAL MORTGAGE CO. OF NORTH CAROLINA

No. 8318SC1294

(Filed 18 December 1984)

1. Appeal and Error § 6.2— partial summary judgment—remaining issues dependent on issue determined—immediately appealable

In an action arising from the transfer of real property, an order of partial summary judgment placing title to the disputed property in one plaintiff for the estate of another affected a substantial right and was immediately appealable where each of the remaining claims was dependent on the determination of title. G.S. 1-277 (1983), G.S. 7A-27 (1981), G.S. 1A-1, Rule 56(b).

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2. Trusts § 16— parol trust—allegations of fraud, deceit, undue influence not repeated in amended complaint—parol trust not available

Plaintiffs could not rely on a parol trust to defeat title to real property where allegations of fraud, deceit, and undue influence were made in the original complaint but not in an amended complaint.

3. Frauds, Statute of § 6.1— not applicable to agreement to release trustee from obligation to reconvey real property

An oral agreement to release defendant trustee from his agreement to hold real property in trust and to reconvey it to one of the plaintiffs was binding because the Statute of Frauds does not apply to contracts to abrogate or abandon a contract to convey. G.S. 22-2.

4. Trusts § 19— release of trustee's promise to reconvey real property—summary judgment improper

Summary judgment should not have been granted for plaintiff beneficiary where she had released the right to demand reconveyance of real property by the trustee because there were issues of fact as to whether the beneficiary had a full and complete understanding of the transaction, whether the consideration paid was fair and adequate, and whether the transaction was in the best interest of the beneficiary. G.S. 36A-66 (Cum. Supp. 1983).

5. Lis Pendens § 1; Registration § 1— trustee's unrecorded promise to reconvey—lis pendens—title affected only by lis pendens

Record title will not be defeated by a trustee's unrecorded promise to reconvey, but a lis pendens indexed prior to sale results in the third party purchaser's title being dependent upon the determination of the trustee's title. G.S. 47-18(a) (1976), G.S. 1-117 (1983), G.S. 1-118 (1983).

APPEAL by defendants from *Wood, William Z., Judge*. Judgment entered 19 October 1983 in GUILFORD County Superior Court. Heard in the Court of Appeals 25 September 1984.

Lillie Lee Johnson, now deceased, was the plaintiff in the original complaint, filed in this action on 27 September 1978, the action having been commenced on 12 September 1978 by filing of summons and order extending time to file complaint. A notice of lis pendens was also filed on 12 September 1978. Dorothy Baity, now a plaintiff, was named as the defendant in the original complaint. By amendment filed 14 November 1978, defendant Charles Brown, Sr. was added as a party defendant. By stipulation, the amendment to the complaint, filed 14 November 1978, was designated as the amended complaint. By order of the trial court entered 6 December 1979, the executor and heirs of Lillie Lee Johnson, then deceased, were substituted as parties plaintiff in the action.

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This amended complaint alleged, in summary, that Lillie Lee Johnson, age 82, was the mother of Dorothy Baity. Johnson was the owner of property located at 409 Willard Street in Greensboro. On 5 September 1978, a deed to said property purportedly from Johnson to Baity was filed in the Guilford County Registry. The deed was dated 9 November 1977. Baity resided with Johnson for about six months prior to November 1977. Johnson at no time intended to deed her property to Baity, but if Johnson did execute and deliver a deed to Baity, the deed was procured by the fraud, deceit, or undue influence of Baity. Johnson demanded that Baity "return" her property to her, but Baity refused. On 12 September 1978, after Johnson initiated this action and filed notice of lis pendens, Baity deeded the property to defendant Brown, whose deed was recorded in the Guilford County Registry. At the time the property was deeded to him, Brown was aware of Johnson's claim that she was the owner of the property and entitled to it. Johnson sought to have the deed set aside and the property reconveyed to her.

Baity and Brown answered; Brown also cross-claimed for reimbursement for the value of his bargain and for the cost of improvements, repairs, insurance, and taxes.

On 11 June 1981, plaintiffs and then defendant Baity filed a stipulation of settlement, wherein it was agreed that at such time as all claims against Brown were finally determined, plaintiffs would take a voluntary dismissal as to Baity, who agreed to execute and deliver to Johnson's executor a quit claim deed to the Willard Street property. By a consent order entered 30 November 1981, Baity was added as a party plaintiff to the action.

On 9 March 1982, the trial court (Judge Kivett) entered an order in which it was noted that in June 1981 Brown encumbered the Willard Street property by a deed of trust. The trial court allowed plaintiffs time to add Beneficial Mortgage Company as a defendant and ordered plaintiffs to file an amended complaint to include all their claims for relief, to be responded to by all defendants, including Beneficial. On 2 November 1982, the trial judge (Judge Beaty) entered an order adding Beneficial and Manus Duffy and Fernande Bennett, trustees, as parties defendant.

Plaintiffs complied with the trial court's order by filing an amended complaint on 3 November 1982, thereby establishing the

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new procedural basis of the civil action. This amended complaint alleged, in essence, that (1) plaintiff Baity had taken title under an oral trust, (2) defendant Brown received title under a written trust providing that he would reconvey to plaintiff Baity on request, but had refused to reconvey, (3) defendant Brown was not an innocent purchaser for value because he had actual and constructive notice of the disputed title prior to his deed, and (4) defendant trustees and defendant Beneficial were not innocent purchasers for value because both defendants had constructive notice of the civil action by *lis pendens*. All defendants answered the 3 November 1981 amended complaint. Defendant Brown alleged that he had purchased the property from Baity and, in the alternative, counterclaimed against plaintiffs seeking reimbursement of purchase price and cross-claiming against defendant Beneficial seeking judgment for the amount of the note. Plaintiff Baity separately replied to defendant Brown's counterclaim raising the Statute of Frauds, *lis pendens*, and equitable estoppel as defenses. Plaintiffs, except Baity, also answered raising essentially the same defenses. Defendant Beneficial answered defendant Brown's cross-claim, and cross-claimed against defendant Brown for the amount of the note. Defendant Brown replied to defendant Beneficial's cross-claim alleging effective mortgage insurance as an affirmative defense.

Plaintiff Baity and defendant Brown moved for summary judgment. The trial court granted partial summary judgment to plaintiff Baity, restoring record title in plaintiff Baity, as trustee for the Johnson estate, voiding the deed from Baity to Brown, and cancelling of record the deed of trust from defendant Brown to defendant trustees. Brown's motion for summary judgment was denied. Plaintiffs' demand for an accounting from defendant Brown, defendant Brown's counterclaim against plaintiffs and cross claim against defendant Beneficial, and defendant Beneficial's cross claim against Brown were not part of the order granting summary judgment.

Defendants appealed.

Anne R. Littlejohn, Hunter, Hodgman, Greene, Goodman & Donaldson, by Richard M. Greene, and Boone, Higgins, Chastain & Cone, by Peter Chastain, for plaintiffs.

J. C. Barefoot, Jr., and Smith, Patterson, Follin, Curtis, James & Harkavy, by Marion G. Follin, III, for defendants.

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WELLS, Judge.

Defendant Brown assigns error to the trial court's grant of partial summary judgment. He argues that (1) the fee simple conveyance from Johnson to plaintiff Baity could not, as a matter of law, be subject to a parol trust, (2) plaintiff Baity had released all rights in the property for valuable consideration, (3) the Statute of Frauds is inapplicable to the executed oral conveyance from plaintiff Baity to defendant Brown, (4) if the Statute of Frauds was applicable, defendant Brown's deed and checks to plaintiff Baity were a sufficient memorandum of sale, and (5) plaintiff Baity's transfer did not violate the Uniform Trust Act. Defendant trustees and defendant Beneficial also assign error to the trial court's grant of summary judgment. Their arguments generally parallel those made by defendant Brown. They additionally argue that they are innocent purchasers for value because the plaintiff's *lis pendens* was ineffective as to them as there is no evidence in the record that it was properly cross-indexed in the chain of title. We reverse the trial court's order and remand for trial on the issues detailed herein.

[1] The threshold question in this case is whether an appeal from the partial summary judgment is properly before this court. Even though plaintiff has not raised this issue on appeal, appellate courts must dismiss an appeal *ex mero motu* if no right of appeal exists. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980), *appeal dismissed*, 301 N.C. 92 (1981) (analytical framework for analysis of summary judgment appeal). When the trial court enters partial summary judgment on "fewer than all the claims . . . [and on] rights and liabilities of fewer than all the parties" appellate review is permissible only "as expressly provided by these rules or other statutes." N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure (1983). N.C. Gen. Stat. §§ 1-277 (1983) and 7A-27 (1981) provide for appellate review of an interlocutory or final judgment if a substantial right is effected.

We hold that the trial court's entry of partial summary judgment placing title of the property in dispute in plaintiff Baity for the estate of Lillie Lee Johnson, cancelling plaintiff Baity's deed to defendant Brown, and cancelling the deed of trust from defendant Brown to defendant trustees effected a substantial right within the meaning of the statutes. Having adjudged the issue of

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title, the only issues remaining to be adjudicated were plaintiff's claims for (1) punitive damages against defendant Brown, (2) an accounting by defendant Brown as to rents and profits accrued during his possession, (3) defendant Brown's counterclaim for payments made to plaintiff Baity, improvements, taxes and insurance payments for the property, (4) defendant Brown's cross claim against defendant trustees for cancellation of the deed of trust and defendant Beneficial for the amount of the note, and (5) defendant Beneficial's cross claim against defendant Brown for the balance of the note. Each of these remaining claims depends on the determination of title to the property.

We now proceed to the question of the propriety of summary judgment in this case.

The entry of summary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' G.S. 1A-1, Rule 56(c). The burden of establishing the absence of any genuine issue as to a material fact rests on the moving party. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392. If the other party opposes the motion with evidentiary materials which indicate the existence of a genuine issue of material fact, or if the movant's own supporting materials suggest the existence of such an issue, then the motion must be denied. *Kidd v. Early*, *supra*.

Whitten v. AMC/Jeep, Inc., 292 N.C. 84, 231 S.E. 2d 891 (1977).

The forecast of evidence in this case may be summarized as follows. Johnson, who was residing in a nursing home, had attempted to sell her residence. Immediate efforts to sell the residence were unsuccessful and on 9 November 1977 Johnson deeded the property to Baity, with the knowledge of some plaintiff family members and on the advice of the listing real estate agent, because it would facilitate sale if Johnson became incompetent or died. Baity's deed was recorded on 5 September 1978.

On 12 September 1978, Baity deeded the property to Charles H. Brown, Sr. Baity conveyed the property to Brown because ownership of the property might reduce the amount of Social

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Security disability benefits she was receiving. By a separate writing, entitled "Acknowledgment," Brown agreed to hold the property in trust, promising to reconvey the property to Baity or her assigns upon request. Brown's deed was recorded on 12 September 1978, but the "Acknowledgment" was never recorded.

After deeding the property to him, Baity directed Brown to rent the residence, the proceeds to be used for the benefit of Johnson. Net rental income was deposited in a local savings and loan account in the name of Brown and his daughter. Brown deducted expenditures for repairs and upkeep, including taxes and insurance, and a small service fee. Baity's Social Security benefits were later reduced, even though she had conveyed the property to Brown. Baity thereafter retained rents from the property for herself. Deposits to the savings and loan account were terminated and the remaining balance paid to Baity.

Johnson died on 30 March 1979. On 6 February 1980 the parties orally agreed to terminate the trust agreement and to release Brown from his obligation to reconvey. The consideration for the release was \$15,000, with no interest, to be paid in monthly installments. Brown made monthly payments to Baity by check, listing the unpaid balance in the memorandum section on some of the approximately fifteen checks made after the alleged date of sale. The last payment was dated 8 April 1981, but Baity refused this and further payments tendered. Brown's version of this transaction was that Baity wanted him to have the property and agreed for that reason to release him from his promise to reconvey. Baity's version was that she may have entered into such an agreement, but if so, it was her request to Brown to reconvey the property to her which was refused by Brown and she felt she had no other choice in the matter.

Defendant Brown executed a deed of trust on 11 June 1981 to Manus Duffy and Fernande Bennett, trustees, in favor of Beneficial to secure defendant Brown's note to Beneficial in the amount of \$17,529.52. The deed of trust was recorded on 17 June 1981.

[2] In analyzing the foregoing forecast of evidence in the light of applicable law, our beginning point is the deed of record from Johnson to Baity. In the original civil action by then plaintiff Johnson, she sought return of title, alleging fraud, deceit, and un-

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due influence. The amended complaint of 3 November 1982, however, did not allege fraud, deceit, and undue influence. Defendant Brown correctly asserts that because plaintiffs failed to assert these grounds in the amended complaint, plaintiffs cannot assert or rely on the parol trust entered into between Johnson and Baity to defeat Baity's title. Our supreme court has held that:

[E]xcept in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass.

E.g., Gaylord v. Gaylord, 150 N.C. 222, 63 S.E. 1028 (1909); *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979).

[3] Under this forecast, for plaintiffs to prevail against Brown and Beneficial, their burden was to prove that Brown did not have title and thus could not convey good title to Beneficial. First, we hold that Baity conveyed her good title to Brown, subject only to his agreement to hold the property in trust and to reconvey to Baity. Next, we hold that Brown and Baity could enter into binding oral agreement to release Brown from his trust and promise to reconvey. While N.C. Gen. Stat. § 22-2 (1965), commonly known as the Statute of Frauds, requires all contracts to convey any interest in land to be in writing and signed by the party to be charged therewith, our supreme court has held that the Statute of Frauds does not apply to contracts to abrogate or abandon a contract to convey. "The statute of frauds applies to the making of enforceable contracts to sell or convey land, not to their abrogation. As a consequence, an executory written contract to sell or convey real property may be abandoned or canceled by mutual agreement orally expressed." *Scott v. Jordan*, 235 N.C. 244, 69 S.E. 2d 557 (1952) (applying principal to equitable conversion interest); *see also Investment Properties v. Allen*, 283 N.C. 277, 196 S.E. 2d 262 (1973) (in context of lease); *Bell v. Brown*, 227 N.C. 319, 42 S.E. 2d 92 (1947) (in context of options).

[4] The forecast of evidence clearly showing that when Brown took title to the Willard Street property, he took it as trustee for Baity; and that until the purported release from the trust, Brown acted as Baity's trustee, appellees contend that Brown was ab-

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solutely prohibited from "purchasing" the property from Baity, citing the provisions of N.C. Gen. Stat. § 36A-66 (Cum. Supp. 1983)¹ and *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E. 2d 449 (1967). G.S. § 36A-66 prohibits sales or transactions between trustees and *the trust*, not between trustees and beneficiaries of trust. *Johnston* involved a purchase by a trustee from the trust of trust property. In the case before us, the beneficiary was releasing the right to reconvey to the trustee. We hold, therefore, that in this case, we are guided by those cases dealing with transactions between trustees and beneficiaries of the trust. Such transactions are presumed fraudulent, *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548 (1961); *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943); *Cole v. Stokes*, 113 N.C. 270, 18 S.E. 321 (1893), and are voidable by the beneficiary unless the trustee can show by the greater weight of the evidence that the transaction was "open, fair, and honest," *McNeill v. McNeill*, *supra*. The criteria established in *Stokes*, which we adopt, are that the trustee must show that the beneficiary had a full and complete understanding of the transaction, that the consideration paid was fair and adequate, and that the transaction was in the best interest of the beneficiary.

Whether Baity and Brown entered into a binding agreement or contract to release Brown from his promise to reconvey is a question which must be answered by the trier of fact, and we therefore reverse the trial court's summary judgment in favor of plaintiffs as to Brown.

[5] Under these circumstances, Brown's title being the keystone to the legal relationship between these parties, summary judgment was improvidently entered in plaintiffs' favor against Beneficial. Should Brown not prevail at trial, then a determination must be made as to whether Beneficial was an innocent purchaser for value. Beneficial's record title would not be defeated by Brown's unrecorded promise to reconvey to Baity. N.C. Gen. Stat. § 47-18(a) (1976) provides:

- (a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three

1. § 36A-66. Trustee buying from or selling to self.

No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate, or from or to a relative, employer, partner, or other business associate.

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years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

As a result of the lis pendens filed in this action, however, Beneficial will be bound by the outcome of the determination of Brown's title. N.C. Gen. Stat. § 1-118 (1983) provides that

From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice.

The lis pendens must be cross-indexed to the "Record of Lis Pendens" maintained by the clerk of superior court. N.C. Gen. Stat. § 1-117 (1983).

The original record on appeal discloses that the lis pendens was indexed on 21 September 1978.² Brown did not convey to Beneficial until 11 June 1981. While normally a party claiming to be an innocent purchaser for value has the burden of proof as to this status, in summary judgment the moving party carries the burden "[i]rrespective of who has the burden of proof at trial . . . to establish that there is no genuine issue of fact remaining . . . and that he is entitled to judgment as a matter of law." *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). Status as an innocent purchaser for value is governed by the registration statute which:

2. The Register of Deeds notation of indexing is found on page 4 of the original record on appeal, lower right section. In printing the working copies used by the parties, the Court of Appeals' printer deleted the notation of indexing, apparently considering it a caption that the parties stipulated to be excluded from printing. Defendants, relying in good faith on working copies of the record on appeal, argued that the record did not disclose indexing of the lis pendens. The original record submitted by counsel is controlling.

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[D]oes not protect all purchasers, but only innocent purchasers for value. . . . While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status. . . . [To be an innocent purchaser for value the party must have] had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property.

Hill v. Memorial Park, 304 N.C. 159, 282 S.E. 2d 779 (1981) (citations omitted) (emphasis in original). Any actual or constructive notice of the pending litigation in this case would bind the purchaser having actual or constructive notice of the pending litigation.

The judgment of the trial court must be reversed and this case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and HILL concur.

DON FLOYD, ERIC PREVATTE AND THE CLYBOURN PINES-COUNTRY CLUB CITIZENS ASSOCIATION v. THE LUMBERTON CITY BOARD OF EDUCATION, THE ROBESON COUNTY BOARD OF EDUCATION, AND RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA

No. 8316SC1295

(Filed 18 December 1984)

1. Statutes § 2.1— local act

An act which operated in Robeson County alone was a local act.

2. Statutes § 2.7; Schools § 3— de-annexation from school administrative unit— constitutionality of local act

Chapter 1248 of the 1981 Session Laws, which provided a means whereby the Clybourn Pines area of Robeson County could be de-annexed from the Lumberton City Administrative Unit and returned to the Robeson County Administrative Unit by joint action of the city and county boards of education, did not violate the prohibition of Art. II, § 24(1)(h) of the N.C. Constitution against local acts establishing or changing lines of school districts since (1) the

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affected areas are administrative units rather than "school districts" and thus fall outside the purview of Art. II, § 24(1)(h) and (2) even if the lines of school districts were involved, the act constituted enabling legislation and did not "establish or change" such lines within the purview of Art. II, § 24(1)(h). G.S. 115C-70(a).

3. Statutes § 2.7— abrogation of special school supplemental tax—constitutionality of local act

A local act which abrogated a former act levying a special school supplemental tax in effect repealed a local act, not the general law of G.S. 115C-501 *et seq.*, and thus did not violate Art. II, § 24(2) or Art. XIV, § 3 of the N.C. Constitution.

4. Schools § 3— de-annexation of area from City Administrative Unit—statutes not violated

The action of city and county boards of education in de-annexing an area from the city administrative unit pursuant to Ch. 1248 of the 1981 Session Laws did not usurp the authority of the State Board of Education under G.S. 115C-70; nor did such action violate the statute dealing with merger of administrative units in the same county, G.S. 115C-67, or the statute relating to the abolishment of special taxes upon the merger or reorganization of administrative units by the State Board of Education, G.S. 115C-12(7).

5. Schools § 10— tuition for persons not residing in administrative unit

It was permissible under G.S. 115C-366.1(a)(2) to assess a tuition against residents of a county administrative unit who attended schools in the city administrative unit.

APPEAL by plaintiffs from *Clark, Judge*. Judgment entered 26 August 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 26 September 1984.

Plaintiffs are residents of and property owners in the Clybourn Pines-Country Club area of Robeson County who have children of school age. They filed this class action against defendant boards of education and the Attorney General of North Carolina. Plaintiffs sought to have Chapter 1248 of the 1981 North Carolina Session Laws and the implementation of that act declared unconstitutional or otherwise illegal, and further sought temporary and permanent injunctive relief restraining defendant boards of education from implementing the act.

At the outset, we clarify the nomenclature of the various groups involved in this action. Both city and county boards of education are established pursuant to G.S. 115C-40. Boards of education are the governing boards of public schools within the school administrative unit (also referred to simply as "administrative

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unit") within a particular city or county. G.S. 115C-5(b) and (c); G.S. 115C-66. In this case, then, the Lumberton City Administrative Unit (hereinafter "City Unit") is under the control of the defendant Lumberton City Board of Education (hereinafter "City Board"), and the Robeson County Administration Unit (hereinafter "County Unit") is under the control of the defendant Robeson County Board of Education ("County Board").

We next set out the factual and procedural history of the litigation. For about a decade beginning around 1960, students from the Clybourn Pines-Country Club area (hereinafter "Clybourn Pines" or "Clybourn Pines area") attended the public schools of the City Unit apparently through an informal, unwritten arrangement. This arrangement was formalized by legislation enacted in 1969. Chapter 611 of the 1969 Session Laws provided a mechanism for the transfer, or annexation, of Clybourn Pines from the County Unit to the City Unit. The procedure for annexation was utilized, and Clybourn Pines children continued to attend Lumberton City public schools. A special school supplemental tax was levied against property owners in the Clybourn Pines area.

In June 1982, the General Assembly enacted Chapter 1248 of the 1981 Session Laws, which act provided a means by which Clybourn Pines could be de-annexed and transferred to the County Unit by joint action of the County Board and the City Board. The reason for the enactment of Chapter 1248 was to remove an objection posed by the United States Department of Justice that the administrative units, as then configured, were in violation of the Voting Rights Act of 1965. Shortly after ratification of Chapter 1248, Clybourn Pines was de-annexed pursuant to its provisions. On 23 August 1982, plaintiffs filed suit contesting the constitutionality of Chapter 1248, and the defendants' implementation of that legislation.

Plaintiffs were initially denied temporary injunctive relief. The case was tried without a jury, and the trial court concluded that the act and the implementation thereof were neither unconstitutional nor otherwise unlawful. Plaintiffs appeal.

Reid, Lewis & Deese, by Renny W. Deese, for plaintiff appellants.

Teague, Campbell, Conely & Dennis, by John W. Campbell, for defendant Lumberton City Board of Education.

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Ward, Strickland & Kinlaw, by Earl H. Strickland, for defendant Robeson County Board of Education.

Edwin M. Speas, Jr., Special Deputy Attorney General, for defendant Rufus L. Edmisten.

EAGLES, Judge.

The two arguments raised by plaintiffs on this appeal are that the trial court committed reversible error by failing to declare Chapter 1248 was unconstitutional or otherwise illegal, and that it erred in declaring that the implementation of the act was not unconstitutional or illegal.

I

The crux of plaintiffs' argument is that the legislation is unconstitutional in that it violates Article II, section 24(1)(h) of the North Carolina Constitution. That section provides, in pertinent part, that: "The General Assembly shall not enact any local, private, or special act or resolution . . . establishing or changing the lines of school districts." *See also* G.S. 115C-70(a), to the same effect. Plaintiffs' position is simply that Chapter 1248 is void because it is a local act changing the lines of school districts. Defendants' contention, adopted by the trial court, is that Chapter 1248 is "enabling legislation" and therefore a proper exercise of legislative authority under Article II, section 24. Our analysis of the constitutionality of Chapter 1248 is composed of three consecutive questions: (1) Is it a *local* act? (2) Does it involve *school districts*? (3) Does it *establish or change* any boundary lines?

A

[1] That Chapter 1248 is a local act, neither party disputes. A local act is one that applies to fewer than all counties without rational distinction between the included and excluded counties in relation to the purpose of the act. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E. 2d 67 (1972). *Accord, Idol v. Street*, 233 N.C. 730, 65 S.E. 2d 313 (1951) (local act operates only in limited territory or specified area). The act in question operates in Robeson County alone and is thus a local, rather than a general, act.

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[2] We next examine whether the areas affected by Chapter 1248 are "school districts," as plaintiffs maintain they are. Defendants' contention is that the affected areas are administrative units, rather than school districts, and thus fall outside the purview of Article II, section 24.

In *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966) the Supreme Court was confronted with an issue similar to the one before us: whether a local act authorizing the merger of three school systems violated Article II, section 29. In an opinion upholding the constitutionality of the legislation, the Court defined "school district," contrasting it with the term "administrative unit":

[A] "school district" is an area within a county in which one or more public schools must be maintained. It is so defined in G.S. § 115-7 [currently G.S. 115C-69]. The three areas established by the present statutes are not "school districts." . . . [T]hese areas are "for the purpose of representation on the Boards of Education." These "areas" relate to the residence of members of the Board of Education, not to the location of schools. An "administrative unit" is not a "school district" within the meaning of Article II, Section 29 [currently Article II, section 24].

Id. at 675, 149 S.E. 2d at 8 (emphasis added). See also G.S. 115C-70 (empowering State Board of Education to create school districts). G.S. 115C-69, the current enactment of the statute referred to in *Hobbs*, provides:

The term "district" here used is defined to mean any convenient territorial division or subdivision of a county, created for the purpose of maintaining within its boundaries one or more public schools. It may include one or more incorporated towns or cities, or parts thereof, or one or more townships, or parts thereof, all of which territory is included in a common boundary.

"Administrative unit" is also defined by statute:

"Local school administrative unit" means a subdivision of the public school system which is governed by a local board of education. It may be a city school administrative unit, a coun-

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ty school administrative unit, or a city-county school administrative unit.

G.S. 115C-5(f). *See also* G.S. 115C-66 (administrative units under supervision and control of boards of education).

It is evident that the effect of the quoted language of *Hobbs, supra*, and the pertinent sections of Chapter 115C is the promulgation of a narrow, specific definition of "school district." Applying the definition to the case at hand, it is equally evident that the de-annexation authorized by Chapter 1248 did not involve school districts, but administrative units. The act does not refer to "school districts"; it refers only to the "Lumberton City School Administrative Unit" and the "Robeson County School Administrative Unit." The act also provides that the transfer of the Clybourn Pines area between units can only be accomplished through the mutual agreement of the city and county boards of education, making it clear that the entities involved are "under the general supervision and control" of a board or boards of education, which comports with the statutory definition of administrative unit. G.S. 115C-66.

There is some indication that the Lumberton City School District and the Lumberton City Administrative Unit cover the same area; *e.g.*, the parties stipulated that "The Lumberton City School District and the Lumberton Administrative Unit are one and the same in territorial extent and jurisdictional authority." The fact that the Lumberton school district and the Lumberton administrative area might cover the same area does not render the legislation unconstitutional, however. The Supreme Court has held that local legislation enacted to change a boundary line that happens to be coterminous with a school district line does not offend Article II, section 24. *Hailey v. Winston-Salem*, 196 N.C. 17, 144 S.E. 377 (1928) involved an act which, in part, made the corporate limits of Winston-Salem coterminous with the boundary lines of a school district. The Court reasoned:

We regard it as obvious that the incorporation of the City of Winston-Salem is not synonymous with the creation of a school district within the meaning of [Art. II, § 24]. . . . It is true that the boundaries of a "district" may be coterminous with those of a city or town, . . . but it does not follow that an act extending the limits of a city or town in which public

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schools may be maintained is necessarily a special act establishing or changing the lines of the school district in violation of the constitutional provision.

Id. at 22, 144 S.E. at 380. Similarly, Chapter 1248 is not in violation of Article II, section 24 because its directives, explicitly aimed at administrative units alone, may have affected school district boundaries coterminous with those of the administrative unit.

Turning to the final question of our analysis, we find that even if Chapter 1248 served to alter the lines of school districts, it did not "establish or change" such lines, as we understand those terms. Article II, section 24(1)(h) has been interpreted only to prohibit local legislation which directly results in a change in the lines of school districts. Enabling legislation which describes the procedure by which a change might be accomplished has been consistently held to be constitutional. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966); *Peacock v. Scotland County*, 262 N.C. 199, 136 S.E. 2d 612 (1964); *Hinson v. Comrs. of Yadkin*, 218 N.C. 13, 9 S.E. 2d 614 (1940); *Fletcher v. Comrs. of Buncombe*, 218 N.C. 1, 9 S.E. 2d 606 (1940).

The issue of whether enabling legislation violates the constitutional prohibition against local acts establishing or changing the lines of school districts was first considered in *Fletcher*, *supra*. The Supreme Court stated that although the primary purpose of the act under consideration was to create a taxing district, there was "no need to evade the fact that school districts are thus created, or may be created under the law." Despite the fact the act created school districts, the Court held that as the act in question was merely enabling legislation, it did not violate then Article II, section 29:

[T]he act in question prescribes a method whereby school districts or special bond tax units may be uniformly established throughout the county. The act itself deals only with the mechanics of establishing or changing the lines of school districts or special bond tax units, and does not, *ex proprio vigore*, undertake to establish or to change any such lines. These are matters which, . . . are committed to the sound discretion of the county board of education. The constitutional prohibition . . . is against direct action on the part of

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the General Assembly and not against the establishment of machinery for the accomplishment of these ends.

Fletcher, supra at 5, 9 S.E. 2d at 609. *Accord, Hobbs, Hinson, Peacock, all supra.* Likewise Chapter 1248 did not effect any modification in the boundary lines between the county and city administrative units; rather, it only established the procedure by which de-annexation could be accomplished.

Plaintiffs further suggest that the procedure for de-annexation contained in the act, namely, public notice, a public hearing, and resolutions by the city and county boards respectively, is not sufficiently elaborate to withstand constitutional challenge. This argument is not persuasive. Not only does the language in the four cases cited give no indication of any intent to discriminate among types of procedures in these cases, the mechanism for de-annexation contained in Chapter 1248 is substantially similar to that in *Fletcher* and *Hinson, supra*.

We note that our result here is compatible with principles of construction by which constitutionality of legislation is measured. First, a presumption exists that a statute is valid, *Assurance Co. v. Gold, Comr. of Insurance*, 249 N.C. 461, 106 S.E. 2d 875 (1959), and that any reasonable doubt as to constitutionality will be resolved in favor of the statute. *Gardner v. Reidsville*, 269 N.C. 581, 594, 153 S.E. 2d 139, 150 (1967). This presumption of constitutionality has been specifically applied to Article II, section 24. *Id.*

Furthermore, when construction of a constitutional provision is at issue, as here, it is incumbent upon us to interpret it in accordance with the intent of its framers and the citizens who adopted it, by inquiring into its history and the purposes sought to be accomplished by its enactment. *Sneed v. Board of Education*, 299 N.C. 609, 613, 264 S.E. 2d 106, 110 (1980). Such an inquiry has been made into Article II, section 24. In *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697 (1965), the Supreme Court noted that in the years preceding the adoption of Article II, section 29 (currently Article II, section 24), the vast majority of the laws passed were local, private or special acts, and that Article II, section 29 was intended to remedy this situation:

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It was the purpose of the Amendment to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, [and] to strengthen local self government by providing for the delegation of local matters by *general laws* to local authorities. . . .

Id. at 656, 142 S.E. 2d at 702. *See also Board of Health v. Comrs. of Nash*, 220 N.C. 140, 16 S.E. 2d 677 (1941) (application of former Article II, section 29 should not be denied on any insubstantial distinction which would defeat its purpose).

Not only is our result in line with these principles, any other result would require that we ignore a fundamental flaw in plaintiffs' position. The plaintiffs have nowhere suggested or argued that the 1969 annexation of Clybourn Pines, accomplished by local legislation, was improper or unconstitutional. To the contrary, that the annexation of Clybourn Pines was constitutional has been at the heart of plaintiffs' position throughout these proceedings. If we were to accept plaintiffs' proposition that the de-annexation was unconstitutional then so, too, was the annexation, since it was accomplished in the same manner. If the original annexation was achieved unconstitutionally, then all Chapter 1248 does is restore the *status quo*, in which Clybourn Pines was part of the county administrative unit. Put another way, plaintiffs' position leads us ultimately to the same result we have reached here: that Clybourn Pines is lawfully a part of the Robeson County administrative unit.

B

[3] Plaintiffs next contend that the abrogation of the special school supplemental tax in Chapter 1248 is unconstitutional, in that Article II, section 24(2) forbids the General Assembly to enact local legislation by partly repealing a general law. They also direct our attention to Article XIV, section 3 of the North Carolina Constitution, which provides in pertinent part that repeal of any law that is required to be enacted as a general law, must also be by general law. Plaintiffs then cite G.S. 115C-501, *et seq.*, as the general law under which they claim the supplemental tax originated, and argue that Chapter 1248 was a local act which impermissibly repealed general law.

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Plaintiffs are incorrect in their analysis. Although the special school tax might have been authorized by utilizing the voter approval mechanism of G.S. 115C-501, *et seq.*, any act actually levying such a tax would plainly be local, and not general, in nature. Thus, insofar as Chapter 1248, a local act, repealed a former act levying the supplemental tax by abrogating the tax, it repealed a local act. Chapter 1248 does not have the effect of repealing the general law of G.S. 115C-501, *et seq.*

II

[4] Plaintiffs' second argument is that the trial court erred in declaring that the *implementation* of Chapter 1248 by the boards of education was not unconstitutional or otherwise illegal. In support thereof, plaintiffs first cite several General Statutes sections that they claim were violated. Although we are not convinced that these alleged statutory violations are properly argued under an assignment of error concerned with the actual implementation of the act, we nonetheless consider them here. Plaintiffs initially contend that G.S. 115C-67 furnishes legal endorsement for the original annexation of the Clybourn Pines area. G.S. 115C-67 deals only with merger of administrative units in the same county, and merger is not an issue here. Furthermore, whether the annexation was accomplished legally is an issue distinct from and irrelevant to the legality of the de-annexation. Next, plaintiffs cite G.S. 115C-70, which provides that school districts may be created or modified exclusively by action of the State Board of Education. It is only necessary to reiterate our conclusion that Chapter 1248 does not establish or change, and hence does not create or modify, school district lines. The action of the city and county boards in de-annexing Clybourn Pines did not, therefore, usurp the statutory authority of the State Board of Education.

Plaintiffs also seem to suggest that G.S. 115C-12(7) has been violated. This statute provides in part that merger or reorganization of administrative units by the State Board of Education shall not "have the effect of abolishing any special taxes that may have been voted in any such units." Citation to this statute is inapposite. The change in school administrative units here was not a merger or reorganization and was not accomplished by the State Board of Education; it was effected by legal action of the city and county boards of education.

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[5] Besides providing a mechanism for de-annexation, Chapter 1248 "empowered and authorized" the city and county boards to assess reasonable tuition against Clybourn Pines students. Plaintiffs contend that the consequent imposition of tuition on the Clybourn Pines residents violated G.S. 115C-366.1(a)(2), which provides that "[l]ocal boards of education may charge tuition to . . . [p]ersons of school age who are domiciliaries of the State but who do not reside within the school administrative unit or district." Contrary to plaintiffs' contention, tuition charges assessed against Clybourn Pines students were consistent with G.S. 115C-366.1(a)(2). Pursuant to Chapter 1248, Clybourn Pines was transferred to the Robeson County School Administrative Unit effective 1 July 1982 upon the adoption of resolutions by the city and county boards. Tuition was assessed against Clybourn Pines students attending public schools located in the Lumberton City Administrative Unit during the school year 1982-83, with special provisions for hardship cases. As of 1 July 1982, Clybourn Pines students were residents of the county administrative unit, not the city unit, and it was permissible to charge them tuition for attending city schools, *i.e.*, schools within the unit where they were not residents.

Finally, plaintiffs contend that the assignment plan for the students never really received mutual approval from the boards of education, and that the transfer of students into the Robeson County Unit was not "orderly" as directed by Chapter 1248. Our examination of the record satisfies us that each board of education adopted a valid resolution de-annexing Clybourn Pines; we are further satisfied that the transfer of students was accomplished in good faith.

Affirmed.

Judges WEBB and BRASWELL concur.

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STATE OF NORTH CAROLINA v. LARRY EUGENE WALLACE

No. 8426SC105

(Filed 18 December 1984)

1. Criminal Law § 66.9— identification from photograph of lineup—no impermissible suggestiveness

A pretrial identification procedure in which a robbery victim identified the defendant as the robber from a photograph of a lineup was not impermissibly suggestive where all persons in the lineup were dressed the same; all were approximately the same height and weight; all but one (not the defendant) had facial hair; all wore a number tag; defendant had no markedly different physical characteristics from other persons in the lineup; and the officer conducting the photographic display told the victim to ignore letters, numbers or scratches on the photograph.

2. Criminal Law § 66.9— photographic identification procedure—number tag on defendant's photograph different from others—no impermissible suggestiveness

A photographic identification procedure was not impermissibly suggestive because the number tag shown in the photograph of defendant was a police identification sign with a case number on it while handwritten number tags were used in the other photographs where each photograph showed the subject's upper torso so that attention was directed toward the face and away from any sign or tag, and where officers told the witness to disregard any signs or marks on the photographs.

3. Criminal Law § 66.9— pretrial photographic identifications—defendant's photograph only one in two procedures—no impermissible suggestiveness

Pretrial photographic procedures were not impermissibly suggestive because defendant was the only person who appeared both in a photograph of a lineup and in individual photographs shown to a robbery victim, especially since the victim was shown the individual photographs ten days after seeing the lineup photograph and did not have both of them before her at the same time for comparison.

4. Criminal Law § 66.16— in-court identification— independent origin from photographic procedures

A robbery victim's in-court identification of defendant was of independent origin and not tainted by pretrial photographic identification procedures where the victim had ample opportunity to view defendant in that the robbery occurred at 9:30 a.m., the lights were on in the laundry in which the robbery occurred, defendant came within eighteen inches of the victim and the victim got a close look at his face; the victim intentionally focused her eyes on defendant in order to remember his features; the victim gave the police an accurate detailed description of defendant; the victim was positive in her first photographic identification of defendant; and only seventeen days passed between the robbery and the victim's first photographic identification of defendant.

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5. Criminal Law § 50.1; Robbery § 3— ability of gun to kill—competency of testimony

A robbery victim's testimony that the gun used by the defendant in the robbery was "one that would kill me if I didn't do what he said" was admissible as an instantaneous conclusion of the mind and did not invade the province of the jury.

6. Robbery § 6.2— robbery indictment—ownership of property taken

There was no fatal variance between an armed robbery indictment charging that the defendant stole seventy-eight dollars from "American Cleaners Corporation, a corporation doing business as Holiday Cleaners when Marianne Elmore Best was present and in attendance" and testimony by the victim that she worked for American Cleaning Corporation, Holiday Cleaners Division.

7. Robbery § 4.3— armed robbery—sufficient evidence of dangerous weapon or firearm

The State's evidence was sufficient for the jury to find that a dangerous weapon or firearm was used in a robbery so as to support defendant's conviction of armed robbery where the victim identified the object in defendant's hand as a "revolver" and as a "gun" and testified that the gun was one that would kill her if she didn't do what the robber said, notwithstanding the victim also testified that she could not remember whether the gun had a hole in its barrel and that the gun "sounded" like a blank gun when it was fired inside the cleaning establishment in which the robbery occurred.

8. Arrest and Bail § 3.6— warrantless arrest—probable cause—exigent circumstances

Officers had probable cause to arrest defendant for certain armed robberies based on an accomplice's confession implicating defendant and his description of defendant which matched that given by witnesses in the offense reports, and the fact that the defendant appeared to be about to check out of a motel and leave the area constituted "exigent circumstances" which excused a warrantless entry by officers into defendant's motel room and their warrantless arrest of defendant. Therefore, a photographic identification of defendant by use of a photograph taken after his arrest should not be suppressed as a product of an illegal arrest.

APPEAL by defendant from *Morgan, Judge*. Judgment entered 9 September 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1984.

On 18 May 1983, the American Cleaning Corporation, Holiday Cleaners Division, in Charlotte was robbed of approximately seventy-eight dollars. The robbery occurred at about 9:30 in the morning. Marianne Best was in the store at that time, training a new employee, Leslie Andrews. Ms. Best observed the perpetrator come into the store, pull out a gun, and say that this was a

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stick-up. He ordered Ms. Best to open the cash register, which she did. The robber then took the cash on hand, and told Ms. Best and Ms. Andrews to go to the back of the store. They did this. The robber fired a shot, and left.

On the morning of 26 May 1983, Charlotte police officers arrested Charles Alexander in connection with robberies in the Charlotte area. In confessions made that morning, Alexander implicated defendant and several others in these robberies. Alexander told the police that defendant was staying at a Charlotte motel. A call to the motel indicated that the defendant had left the motel and police requested the motel clerk to call them when the defendant returned. Within fifteen or twenty minutes, the police were notified that the defendant had returned and was removing articles from his room as if in preparation to leave. They went to the motel and arrested defendant without a warrant.

On the day he was arrested, defendant was photographed individually by police. Later in the day, the police obtained warrants for defendant's arrest in connection with robberies not involved in this case. On 1 June 1983, the defendant was photographed as part of a line-up. On 29 June 1983, a warrant was issued for defendant's arrest for the robbery in the present case.

A Charlotte police officer, Officer Alsbrook, showed two line-up photographs to Ms. Best on 4 June 1983, one containing defendant. Ms. Best identified defendant in the photograph containing him, and failed to identify anyone in the photograph not containing him. Ten days later, Officer Alsbrook showed Ms. Best a stack of five individual photographs, one of which depicted defendant. Again, Ms. Best identified the defendant as perpetrator of the robbery. Ms. Best identified defendant at trial.

Defendant was convicted of armed robbery and sentenced to twenty-four years in prison. From this judgment, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Jane P. Gray, for the State.

Ellis M. Bragg for defendant appellant.

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ARNOLD, Judge.

1. The Suppression of Identification Evidence

Defendant contends that the trial court erred in denying his motion to suppress all evidence of a pretrial out-of-court photographic identification and the in-court identification of defendant by the witness Marianne Best. Defendant argues that the out-of-court photographic display was so suggestive and that Ms. Best's in-court identification was so unreliable that there was a substantial chance that she mistakenly identified defendant, thus causing a denial of his right to a fair trial. We disagree.

Identification evidence must be excluded as violative of the due process clause "where the facts of the case reveal a pretrial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification." *State v. Thompson*, 303 N.C. 169, 171, 277 S.E. 2d 431, 433 (1981). In determining whether the out-of-court photographic identification is suggestive, the factors to be considered include whether the accused is somehow distinguished from others in the line-up or in a set of photographs, *see id.*; *State v. Smith*, 278 N.C. 476, 180 S.E. 2d 7 (1971), and whether the witness is given some extraneous information by the police which leads her to identify the accused as the perpetrator of the offense. *Id.*

[1] In the case at bar, the witness was first given a photograph of a line-up of which the defendant was a member. All persons in the line-up were dressed the same, in khaki shirts and dark pants. All were approximately the same height and weight. All but one (not the defendant) had facial hair. Four had close-cropped head hair while the other two had somewhat longer hair. All wore a number tag. As compared to the others, defendant had no markedly different physical characteristics. The witness chose defendant out of this line-up. She said she was positive about this identification. She testified that the police officer conducting the photographic display told her to ignore letters, numbers, or scratches on the photograph. We find nothing suggestive in this method of identification.

The witness was given another similar line-up photograph, which did not contain defendant. She refused to identify anyone in that photograph as the person who committed the robbery.

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[2] Finally, the witness was shown individual photographs, one of which pictured the defendant. All persons in this set of photographs wore glasses, had facial hair, and had head hair approximately the same length as the defendant's. In each photo, there were number tags. Yet, in defendant's photo, the number tag was a police identification sign with a case number on it. In certain circumstances, such a sign might have impermissibly influenced the witness to identify the defendant as the robber. Clearly, the better practice for such photographic identification would have been to use a handwritten tag in defendant's photograph, as was used with the other persons. We do not find, however, that in this case the police number sign was so suggestive that it would make a misidentification substantially likely. Each photograph had some sort of numbered sign or tag, located on or to one side of the subject. Indeed, one of the subjects (not the defendant) was pictured next to a height chart. Each photo was taken of the subject's upper torso so that attention was directed towards the face and away from any sign or tag. The police told the witness to disregard any sign or marks. In light of these circumstances, the police number tag did not so taint the photo identification that it should have been excluded.

[3] Finally, we deal with the issue of repetition. Defendant was the only subject pictured in both the photo line-up and the individual photographs. Our study of the photographs convinces us that this also was not unduly suggestive, especially in light of the fact that the witness was shown the individual photographs ten days after seeing the line-up, and did not have both of them before her at the same time for comparison.

[4] Defendant contends that the in-court identification was tainted by the victim's out-of-court identification of defendant in the police photographs. Even if the photographic identification was impermissibly suggestive (and we find it was not), the central question is whether, under the totality of the circumstances, "the identification of defendant at trial was reliable and of independent origin." *State v. Headen*, 295 N.C. 437, 441, 245 S.E. 2d 706, 710 (1978). In assessing the reliability and independent origin of the identification, we must consider: the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the

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time between the crime and the confrontation. *Headen*, 295 N.C. at 442, 245 S.E. 2d at 710.

Opportunity to view: Ms. Best had ample opportunity to view the defendant. The crime occurred at around 9:30 in the morning. All the lights were on in the laundry. Nothing obstructed Ms. Best's view of defendant. He came within eighteen inches of her, and she got a close look at his face. She was not wearing her prescribed eyeglasses that day, but she was farsighted, so that whether she wore them or not made no difference as to her capacity to identify the robber.

Degree of attention: We are convinced that Ms. Best intentionally focused her eyes on the defendant in order to remember his features. Unlike Ms. Andrews, the other shop assistant, who became upset, Ms. Best had considerable control of herself during the crime.

Accuracy of the description: Ms. Best gave police officers a detailed description of defendant. It was accurate, as to height, weight, and facial pockmarks. Ms. Best described no particular features defendant did not possess. Nor did he have any outstanding feature she failed to mention.

Witness's level of certainty: Ms. Best said she was absolutely positive in her identification of defendant in the first line-up photo. In court as well, she appeared to have no problem in identifying him.

Time between the crime and the confrontation: The crime occurred on 18 May 1983. Within a week after the crime, Ms. Best was shown the photo of the line-up that did not contain defendant. She was shown the photo of the line-up that contained defendant on 4 June 1983 and positively identified him. She was shown the individual photographs on 14 June 1983. Trial occurred in early September, 1983. The time between the crime and Ms. Best's photo identification was relatively short. The time between the crime and her in-court identification was not so long as to make the identification doubtful.

Weighting the factors in this case we do not find reason to doubt the reliability and independent origin of Ms. Best's in-court identification, even had the photographic identification been impermissibly suggestive.

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2. Admissibility of "Opinion" Testimony

[5] The defendant contends further that the trial court erred in admitting testimony of Marianne Best to the effect that she believed that the gun used in the robbery would kill her if she did not do what the robber said. The defendant argues that such testimony was an unsupported statement of opinion that invaded the province of the jury to decide whether the robber used a dangerous weapon and so threatened Ms. Best's or Ms. Andrews's life.

Opinion evidence is generally inadmissible if the witness can relate the facts "so that the jury will have an adequate understanding of them and the jury is as well-qualified as the witness to draw inferences and conclusions from the facts." 1 Stansbury's North Carolina Evidence § 124 (Brandis rev. 1973), *quoted in State v. Lucas*, 302 N.C. 342, 348, 275 S.E. 2d 433, 437 (1981). The "opinion rule" forces the witness to give as detailed a recital of his or her perception of the facts as is reasonably possible. The rule appears to have two purposes: to test the witness's perception of the facts, and to prevent the witness from unfairly influencing the jury's conclusions. 1 Brandis on North Carolina Evidence § 123 (2d rev. ed. 1982). The rule has been much-criticized, and is subject to a number of exceptions, *see id.* at § 125. One of these, which we feel applies in this case, is that a witness may testify as to "instantaneous conclusions . . . derived from observation of a variety of facts presented to the senses at one and the same time." *State v. Joyner*, 301 N.C. 18, 23, 269 S.E. 2d 125, 129 (1980).

In this case, the prosecution seeks to prove that defendant is guilty of armed robbery as defined in G.S. 14-87(a). Two elements of that crime are (1) that the accused had in possession, used or threatened to use a firearm or other dangerous weapon and (2) that he used it to endanger or threaten the life of another person. The defendant alleges that the witness, Ms. Best, should not have been allowed to testify directly that the gun in the robber's hand was one that would kill her if she did not do what he said. Defendant argues that she was testifying directly as to the ultimate fact that the weapon was dangerous and threatened her life. This, the defendant says, the jury should have decided without her testimony.

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Ms. Best positively identified the object in the defendant's hand as a "revolver," and as "a gun." The prosecuting attorney then asked her what type it was:

Q. *At the time that the gun was being pointed at you across the counter, did you know what kind of gun it was?*

Mr. Bragg: Objection

The Court: Overruled.

A. No, only that it was a revolver.

Q. Do you know to this date what kind of gun it was?

A. No I do not.

Q. What kind of gun *did you believe it to be?*

Mr. Bragg: Objection.

The Court: Overruled.

A. One that would kill me if I didn't do what he said. (Emphasis added.)

Ms. Best was thus being asked, since she did not know the make or type of gun the robber pointed at her, what was her belief or impression at the time as to the type of gun the robber held. Her belief at the time of the crime was an "instantaneous conclusion," drawn from observation of a variety of facts at once. *See Joyner*, 301 N.C. at 23, 269 S.E. 2d at 129. It was an "opinion" which in a legal sense was a "fact," helpful to the jury in comprehending what happened the morning of 18 May. The jury's province was not invaded by allowing it to consider and weigh this evidence along with Ms. Best's "opinion" that the gunshot sounded like that from a starter's pistol, and her failure to remember whether the gun had a hole in the barrel.

3. Variance between the indictment and the proof

[6] The defendant contends next that there was a fatal variance between the allegations in the indictment and the evidence at trial as to the location of the alleged robbery and the person or entity from whom personal property was taken. The indictment read that defendant stole seventy-eight dollars from "American Cleaners Corporation, a corporation doing business as Holiday

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Cleaners when Marianne Elmore Best was present and in attendance." Ms. Best testified on direct examination that she worked for American Cleaning Corporation, Holiday Cleaners Division. On cross-examination, she said she worked for Americana Cleaning Corporation.

"[A] fatal variance results in larceny cases where title to the property is laid in one person by the indictment and proof shows it in another." *State v. Spillars*, 280 N.C. 341, 345, 185 S.E. 2d 881, 884 (1972); see also *State v. Law*, 227 N.C. 103, 104, 40 S.E. 2d 699, 700 (1946). In the case at bar, the testimony at trial did not show that the money stolen was taken from a business other than the Holiday Cleaners where Ms. Best was employed, or that there were two corporations, one called the American Cleaners Corporation and the other called the Americana Cleaning Corporation, both operating businesses called Holiday Cleaners. It only showed a slight discrepancy between the corporate name given in the indictment and that given by Ms. Best. We are not convinced that there was a fatal variance between the allegations of the indictment and the proof at trial, such that crimes at two different places of business were described.

4. Denial of defendant's motion for judgment as of nonsuit and for dismissal

[7] Defendant contends also that the trial court erred in denying his motion for judgment as of nonsuit and for dismissal when there was insufficient evidence as a matter of law of the commission of a robbery with a firearm or dangerous weapon as provided in G.S. 14-87(a). In ruling on the defendant's motions, the trial court must determine whether there is substantial evidence on every element of the offense charged, interpreting the evidence in the light most favorable to the State. *State v. Wright*, 302 N.C. 122, 126, 273 S.E. 2d 699, 703 (1981); *State v. Quick*, 60 N.C. App. 771, 772-73, 299 S.E. 2d 815, 816 (1983). The defendant argues that the State failed to provide "substantial evidence" that a dangerous weapon or firearm was used in the commission of the robbery at Holiday Cleaners.

The State provided testimony by Ms. Best that the robber held a "revolver," and a "gun." She testified further that she could not remember whether it had a hole in its barrel, but that it was the type of gun that could kill her, i.e., that it was a real gun.

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She also testified that when the gun was fired inside the cleaning establishment, it *sounded* like a blank gun. The State elicited from Ms. Best that the building was made of cinder block, and that the ceiling was partially cinder block and partially, as we understand, ceiling tiles on runners. Ms. Best and Ms. Andrews were standing at the rear of the building when the shot was fired, where there were four racks of clothes, each thirty feet long, and various pieces of dry-cleaning and ironing equipment. Drawing all inferences in favor of the State, we conclude that the jury had substantial evidence to conclude that the gun was a real and dangerous weapon, and that the sound of the shot was affected by the acoustical properties of the building.

5. Lawfulness of the warrantless arrest

[8] Defendant contends finally that the trial court erred in concluding as a matter of law that he was under lawful arrest at the time he was photographed. The issues we face are whether the police had probable cause to arrest defendant and whether "exigent circumstances" excused their obtaining an arrest warrant.

On the morning of 26 May 1983, the Charlotte police arrested Charles Alexander. Mr. Alexander had been staying at the New Imperial Motel in Charlotte, and was suspected of being involved in armed robberies in the Charlotte area. At 9:45 a.m., Alexander signed a statement implicating the defendant and several other persons in two of nine armed robberies Alexander had committed. Alexander gave a description of defendant which matched that given in offense reports the police had for robberies in Charlotte. The information given by Alexander, together with the fact that his description of defendant matched that given by witnesses in the offense reports, gave the police a reasonable ground to believe that defendant had participated in armed robberies in Charlotte. They therefore had probable cause to arrest him. See *State v. Alexander*, 279 N.C. 527, 532, 184 S.E. 2d 274, 278 (1971).

Alexander told the police that defendant was also staying at the New Imperial Motel, in the same room Alexander had occupied. At 10:00 a.m., the police called the motel clerk, who informed them that defendant had recently left the motel with another person. The police asked the clerk to call them when defendant returned. The police were in the process of making out warrants when the clerk called and informed the police that

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defendant had returned and was taking articles out of the motel room as if in preparation to leave. This occurred fifteen to twenty minutes after the police called the motel. On hearing that defendant was leaving, the police immediately went to the motel. They arrested defendant in his room without a warrant at 10:25 a.m.

Applying the "totality of the circumstances" test adopted in *State v. Yananokwiak*, 65 N.C. App. 513, 517, 309 S.E. 2d 560, 563 (1983), we hold that the fact that the defendant appeared to be about to check out of the motel and leave the area, and that he was suspected of having participated in more than one violent offense, constituted "exigent circumstances" which excused the warrantless entry into defendant's motel room and arrest. Thus, the testimony as to identification of defendant, resulting from the use of a photograph of defendant taken after his arrest but before warrants were secured, should not be suppressed under the rule of *State v. Accor*, 277 N.C. 65, 84, 175 S.E. 2d 583, 595 (1970), as the product of an illegal arrest.

No error.

Judges WELLS and HILL concur.

THAD DOTSON AND WIFE, LILLIAN DOTSON, JAMES R. DOTSON AND WIFE, THELMA W. DOTSON, JESSE DAL DOTSON, WIDOWER, HEIDI F. DOTSON, LEGALLY SEPARATED, MARY BURTON AND HUSBAND, WIRRON BURTON, B. DWIGHT DOTSON AND WIFE, BETTY DOTSON, TONY DANIEL DOTSON AND WIFE, MIRIAM DOTSON, JIM L. BURRELL AND WIFE, ALICE D. BURRELL, AND ROGER QUENTIN ANDERSON AND WIFE, JUDITH ANN PULLEY ANDERSON v. WILLIAM A. PAYNE AND WIFE, BETTY J. PAYNE

No. 8428SC514

(Filed 18 December 1984)

1. Highways and Cartways § 11.1— prescriptive easement over old logging road—evidence insufficient to show neighborhood public road

In an action to establish a prescriptive easement over an old logging road, defendants' motions for a directed verdict and for judgment n.o.v. should have been granted on the issue of neighborhood public road where plaintiffs failed to establish that the roadway ever served a public use or that the portion of

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the roadway traversing the defendants' property was an established road or street or was a properly established easement under the law. G.S. 136-67.

2. Easements § 6.1— prescriptive easement over old road— evidence sufficient for jury

In an action to establish a prescriptive easement over an old logging road, defendants' motions for a directed verdict and for judgment n.o.v. were properly denied on the issue of adverse use where plaintiffs presented evidence that the disputed roadway was the only means of access to the plaintiffs' land, that it had been openly and continuously used by the plaintiffs or their predecessors-in-title for more than 20 years, that permission to use the road was never asked nor given, and that plaintiffs had on at least one occasion smoothed the road or attempted to work on it. However, because the issue of neighborhood public road was improperly submitted to the jury and its effect on the prescriptive easement issue could not be determined, the issue of prescriptive easement was remanded.

3. Compromise and Settlement § 6— prescriptive easement— testimony of settlement negotiations— improperly admitted

In an action to establish a prescriptive easement over an old logging road, the trial court erred by not striking a portion of the testimony of plaintiffs' surveyor concerning settlement negotiations from which the jury could infer that plaintiffs recognized a right-of-way over their property in defendants' favor.

4. Evidence § 31— prescriptive easement— prior right-of-way agreement— document not introduced— best evidence rule violated

In an action to establish a prescriptive easement over an old logging road, the court erred by admitting testimony concerning a 1938 agreement between all the landowners on the road where plaintiffs did not produce the original document or evidence to excuse the nonproduction of the document referred to in the testimony.

APPEAL by defendant from *Howell, Judge*. Judgment entered 16 November 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 October 1984.

Brock, Begley & Drye by Wm. Michael Begley for plaintiff appellees.

Jack W. Westall, Jr., by K. G. Lindsey for defendant appellants.

BRASWELL, Judge.

In this land lawsuit the plaintiffs want the right to a prescriptive easement over and along the southwest boundary line of the defendants' property for a right-of-way for ingress,

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egress, and regress to the plaintiff Andersons' adjoining property and to the remaining plaintiffs' remote and non-contiguous property. An old logging road allegedly traversed the area. In a jury trial the two issues of easement by twenty years' adverse use and easement by establishment of a neighborhood road were answered in plaintiffs' favor. The defendants appeal alleging errors in the admission of evidence and errors of law in failing to grant defendants' motions for directed verdict and judgment notwithstanding the verdict.

Also, defendants contend that it was prejudicial error to allow an amendment to the pleading to conform to the evidence and to charge on the issue of a neighborhood public road. We agree and order a new trial as to whether the plaintiffs can establish a prescriptive easement.

The plaintiff Andersons' 12.40-acre tract (hereinafter referred to as the Anderson tract) adjoins the southwest boundary of the defendants' property. The remaining fourteen plaintiffs own a portion of a 129.40-acre tract of land (the Dotson tract) which is located east of the defendants' tract. The Dotson tract and the defendants' tract are separated by a 200-acre tract of land owned by the Presbytery of Asheville. According to the plaintiffs, there exists a roadway reaching to the northwest up to Old Fort Road, and extending southeast across the defendants' and the Andersons' common boundary, across the Presbytery property to the Dotson tract.

In 1980, the defendants purchased its 13.13-acre tract from John E. Fite, *et al.* In this deed, the description of the southwest boundary refers to a road and to a plat which shows a twenty-foot roadway along this boundary. The deed also contains the following language:

TOGETHER WITH the burdens and benefits of the right of way as described herein and as shown on the aforesaid plats, along and with the Southwestern boundary of the property and of a separate private [sic] road as described herein which bounds the Southeastern portion of the property.

In 1981 and 1982, the plaintiffs executed right-of-way agreements with all the landowners, except the defendants, on whose property the roadway traversed. On 25 February 1983, the

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plaintiffs instituted this action against the defendants alleging two alternative theories in the complaint by which the plaintiffs could establish their right to use that portion of the road crossing the defendants' property. The plaintiffs first asserted that this roadway was dedicated to the public by the defendants' predecessor-in-title and others in a 1938 petition and right-of-way agreement offered to, but not accepted by, the State Highway and Public Works Commission. The complaint's second theory alleged that the plaintiffs have acquired an easement by prescription over the southwest boundary of the defendants' property.

At trial, the plaintiffs filed a written motion to amend the pleadings to conform to the evidence in order to have submitted to the jury the issue of whether or not this roadway constituted a neighborhood public road under G.S. 136-67. Their motion was granted by the trial court. The defendants offered no evidence of their own at trial.

Only the following two issues, answered in favor of the plaintiffs, were submitted to the jury:

1. Have the plaintiffs acquired an easement over the lands of the defendants by adverse use of the road described in the Complaint for a period of twenty (20) years before this action was filed on February 25, 1983?
2. Have the plaintiffs acquired an easement over the lands of the defendants by the establishment of a neighborhood road in 1941?

Of the plaintiffs' eight assignments of error, the determinative issue on appeal is whether the trial court properly denied the defendants' G.S. 1A-1, Rule 50(a) motion for a directed verdict and their later Rule 50(b) motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict is technically a renewal of the motion for a directed verdict. The motion asks that the judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict rendered by the jury. Thus, the standard of our review for both motions is the same. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). We must determine whether the evidence taken in the light most favorable to the

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plaintiffs was sufficient for submission of the case to the jury. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982).

At the outset, we note that it appears from the record that the plaintiffs abandoned at trial, and likewise on appeal, their easement by dedication theory. To establish the dedication of a road for public use, the plaintiffs must show by competent evidence that the dedication was offered and accepted by the appropriate authority. *Ramsey v. Dept. of Transportation*, 67 N.C. App. 716, 313 S.E. 2d 909, *disc. rev. denied*, 311 N.C. 306, 317 S.E. 2d 681 (1984). As conceded in the plaintiffs' brief, the 1938 petition and right-of-way agreement executed in favor of the State by the landowners whose property was crossed by the roadway was never accepted by the State. Since no dedication of this roadway occurred, the plaintiffs could establish no right on this theory to use the portion of the road located on the defendants' property.

We also find it important to note that the plaintiffs did not proceed at trial on the basis that the petition and right-of-way agreement granted to, but not accepted by, the State or the "burdens and benefits" clause in the defendants' deed constituted an express easement of record in their favor. As stated earlier, the 1938 right-of-way agreement does not purport to grant any right of ingress or egress to any person, including the plaintiffs, other than the State. Similarly, although the deed to the defendants refers to the roadway in question as a right-of-way, the clause does not expressly grant an easement, expressly reserve an easement, or identify any instrument that had previously granted the plaintiffs an easement across this portion of the defendants' property.

In order to determine whether the defendants' motions were properly denied, we must first determine whether the plaintiffs presented sufficient evidence to have the issues of prescriptive easement and neighborhood public road submitted to the jury. The more troublesome of the two issues, neighborhood public road, will be discussed first.

[1] The plaintiffs claim that they presented sufficient evidence that the disputed roadway became a neighborhood public road in 1941 pursuant to G.S. 136-67. This statute declares three different types of existing roads as neighborhood public roads. *Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56, *cert. denied*, 281 N.C. 515,

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189 S.E. 2d 35 (1972). The plaintiffs argue that the roadway in question falls within the third type of roadway specified in the statute which was created by a 1941 amendment to the statute and further amended in 1949. This portion of G.S. 136-67 specifies that

all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have been a portion of any State or county road system, are hereby declared to be neighborhood public roads. . . .

The statute further provides that "this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use." *Id.* From our review of the evidence presented, the plaintiffs have failed to establish that this roadway ever served a public use. Although there was testimony by the Dotsons that at different times before 1941, two or three families had lived and worked the Dotson tract, the plaintiffs have not presented evidence that the road was used by the general public or by anyone other than those who were at the time residing on the tract. According to plaintiff Thad Dotson, around 1941, the operative time of this portion of the statute, the road was used by the Searcy family who farmed the land as sharecroppers "for general travel to and from outside places." After the Searcys left in the early 1940's, another family moved on the Dotson tract and "used the road for about the same purposes as the . . . Searcys." During this time the Dotson family who still owned the tract only used the road periodically to see about the farm, to harvest firewood, and to hunt. Thus, the plaintiffs' evidence tends to show that in 1941 this roadway served an essentially private use, and not a public one.

In 1946, the portion of G.S. 136-67 which deals with the third type of public road was a new amendment to the statute. The Supreme Court in *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E. 2d 371, 373 (1946), interpreted the statute's legislative intent:

The General Assembly is without authority to create a public or private way over the lands of any citizen by legislative fiat, for, to do so, would be taking private property

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without just compensation. (Citation omitted). In construing the amendment, therefore, we may not assume that such was its intent. It follows that the 1941 Act . . . necessarily refers to traveled ways which were at the time established easements or roads or streets in a legal sense. It cannot be construed to include ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor to those adversely used for a time insufficient to create an easement.

We hold that the evidence presented by the plaintiffs fails to show that in 1941 the portion of this roadway traversing the defendants' property was an established road or street or was a properly established easement under the law. Thus, with regard to the neighborhood public road issue, the defendants' motion for a directed verdict and later motion for judgment notwithstanding the verdict should have been granted. Because the plaintiffs did not make out a case sufficient to carry the issue of neighborhood public road to the jury, it was prejudicial error for the trial court to allow an amendment to the pleading to allegedly conform to the evidence and to charge on the issue of neighborhood public road.

[2] With regard to the other issue submitted to the jury, it does appear that the plaintiffs may have presented a prima facie case for the submission to the jury the issue of prescriptive easement. The defendants would be "entitled to a directed verdict, and thus, a judgment notwithstanding the verdict only if the evidence, when considered in the light most favorable to the plaintiffs, fails to show the existence of each and every element required to establish an easement by prescription." *Potts v. Burnette*, 301 N.C. 663, 665, 273 S.E. 2d 285, 287 (1981). For the establishment of a prescriptive easement, the plaintiffs must show the following elements by the greater weight of the evidence: "(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period. *Id.* at 666, 273 S.E. 2d at 287-88.

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The defendants contend that the plaintiffs have failed to present evidence to rebut the presumption that their use of the roadway was permissive.

We find that this case is factually similar to *Dickinson v. Pake*, *supra*, and *Potts v. Burnette*, *supra*. In both of these cases the plaintiffs presented evidence that the disputed roadway was the only means of access to the plaintiffs' land, that it had been openly and continuously used by the plaintiffs or their predecessors-in-title for more than twenty years, that permission to use the road was never asked nor given, and that the plaintiffs had on at least one occasion smoothed the road or attempted to work on it. In both instances, the Supreme Court held that this evidence was sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that a prescriptive easement had been established. Likewise, in the present case, Thad Dotson testified that the road in question was the only means of access to their property, that they had periodically worked on the road, and that he "never asked anybody's permission to use the road and nobody ever gave [him] permission to use the road." We conclude therefore that this issue was properly submitted to the jury.

However, even though the defendants' motions may have been properly denied with regard to the prescriptive easement issue, we cannot allow the jury's verdict in the plaintiffs' favor to stand as is. Because the issue of neighborhood public road was improperly submitted to the jury and since we are unable to determine how this error may have affected the jury's answer on the prescriptive easement issue, we must remand this case for a new trial as to whether the plaintiffs can establish a prescriptive easement.

[3] Two other assignments of error raised by the defendants also justify granting a new trial. The defendants contend the trial court committed reversible error when it failed to grant their motion to strike concerning a portion of the testimony of Bill Bradley, a registered land surveyor called by the plaintiffs. On redirect examination, Mr. Bradley stated:

When I was out there on the road earlier with you [plaintiffs' attorney] and Mr. Westall [defendants' attorney] it was to

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decide if we could establish a right of way over Mr. Payne's property.

When asked later what he did on another trip to the property, Bradley replied that he tied markers to "the points that you and Mr. Westall had flagged."

We agree with the defendants that this evidence was inadmissible because it concerns settlement negotiations between the parties. From Bradley's testimony, the jury could infer that the defendants did in fact recognize a right-of-way over their property in the plaintiffs' favor. In order to encourage the out-of-court settlement of disputes, North Carolina law forbids the admission of evidence having to do with, and made in the course of, settlement negotiations. See *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982). We hold, therefore, that the trial court committed reversible error by failing to grant the defendants' motion to strike and that since the admission of this evidence was highly prejudicial, we remand this case for a new trial.

[4] The defendants' remaining assignment of error with merit concerns the admission of Thad Dotson's testimony that he drove his father in 1938 to "every landowner on that road and they agreed for a sixty foot right-of-way . . . [and] all signed a 60 foot right-of-way" agreement. By Dotson's testimony, the plaintiffs have placed the contents of this 1938 60-foot right-of-way agreement into issue, particularly as to whether the right-of-way allegedly agreed to in 1938 is the right-of-way now in dispute.

Although a right based on an expressed easement was not pled in their complaint, the plaintiffs, by placing the contents of a document which potentially could have been dispositive of the central issue in this case, have violated the "best evidence rule." This rule provides that because "*a writing is the best evidence of its contents*," the original document itself must be produced. 2 Brandis on North Carolina Evidence Sec. 190 (2d ed. 1982). The plaintiffs did not produce the document to which Dotson refers. Plaintiffs' Exhibit 15, the 1938 right-of-way agreement and petition, is not an agreement between landowners, but is an offer of dedication to the State. The plaintiffs also did not offer evidence to excuse the nonproduction of the document referred to in Dotson's testimony. Because the plaintiffs have attempted to establish an easement across the defendants' property through the

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existence of such a document, they should be required to produce it. We hold that it was reversible error for the trial court to deny the defendants' motion to strike and to admit this portion of Dotson's testimony.

New trial.

Chief Judge VAUGHN and Judge EAGLES concur.

BARRUS CONSTRUCTION COMPANY, A DIVISION OF APAC-CAROLINA, INC. v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8411SC195

(Filed 18 December 1984)

1. Highways and Cartways § 9— highway contract claim—alias summons—proper service of process

Where plaintiff's suit on a highway contract claim was filed and summons was issued within six months after the final decision of the State Highway Administrator as required by G.S. 136-29 but the summons was not properly served on defendant Department of Transportation's registered process agent or the Attorney General, plaintiff timely continued its action by obtaining an alias summons thirty-five days after issuance of the original summons although the alias summons was obtained after the six-month period had expired, and defendant's motion to dismiss was properly denied where the alias summons was served in due time on the defendant.

2. Highways and Cartways § 9— highway construction contracts—unequal extensions of interim and final completion dates

Where a highway construction contract provided for completion of all work except certain landscaping by an interim completion date, followed by a 180-day inspection period, and ending in a final completion date, provided for liquidated damages of three hundred dollars per day for overrunning of each completion date, and allowed the Department of Transportation to grant extensions for good cause shown, the Department of Transportation was not required to grant an extension of the final completion date which was 180 days after the extended interim completion date but could grant unequal extensions for the interim and final completion dates.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 16 November 1983 in JOHNSTON County Superior Court. Heard in the Court of Appeals 13 November 1984.

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Plaintiff construction company entered into a highway improvement contract with the North Carolina Department of Transportation ("the DOT"). The contract provided for completion of all work except certain landscaping by an "interim completion date," followed by a 180-day inspection period, ending in a "final completion date," to check the performance of highway markings. The original interim and final completion dates were set at 15 November 1978 and 1 May 1979, respectively; the interval was only 166 days. The contract provided for liquidated damages of \$300 per day for overrunning each completion date; it also allowed the DOT to grant extensions for good cause shown.

Various problems arose, resulting in substantial delays in the project. Actual completion of intermediate work did not occur until 30 June 1979, and actual final acceptance took place 27 December 1979, 180 days later.

On 12 September 1979 plaintiff applied for extensions of both the intermediate and final completion dates. Plaintiff asked for an interim date of 6 May 1979, an extension of 172 days, and a final date of 10 November 1979, an extension of 198 days. The interval between the two requested dates was 192 days. The DOT extended the intermediate date to 18 March 1979, an additional 123 days, and the final date to 16 July 1979, an additional 76 days. This resulted in an interval of 120 days.

The DOT assessed liquidated damages according to its adjusted dates, and plaintiff filed a verified claim. Plaintiff contended that the final completion date should have been adjusted equally with the interim date, to keep the 180-day interval constant. Thus, the final date would become 14 September 1979, 180 days after the DOT's adjusted interim date of 18 March 1979. The difference of 60 days would reduce the DOT's assessment by \$18,000, the amount of plaintiff's claim. For clarity, a table showing the various dates follows:

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	<u>Original Contract</u>	<u>Plaintiff's Requested Adjustment</u>	<u>Plaintiff's Requested Date</u>	<u>Adjustment Allowed by DOT</u>	<u>Adjusted Contract Dates</u>	<u>Actual Dates</u>	<u>Overrun</u>
Intermediate Completion Date	15 November 1978	172 days	6 May 1979	122 days	18 March 1979	30 June 1979	104 days
Final Completion Date	1 May 1979	198 days	10 November 1979	76 days	16 July 1979 ^a	27 December 1979	164 days ^b
Difference	166 days	26 days	192 days	46 days	120 days ^c	180 days	
						TOTAL OVERRUN	268 days ^d

a Plaintiff contended this should be 14 September 1979,
60 additional days, to keep 180 day interval

b Plaintiff's contended date yields 104 days

c See note a

d Plaintiff's contended date yields 208 days

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On 22 February 1982, the State Highway Administrator denied plaintiff's claim, and plaintiff filed suit on 17 August 1982. The DOT moved to dismiss for lack of timely service of process, but the court denied the motion. Discovery ensued; plaintiff moved for summary judgment based on the pleadings, discovery materials, and stipulated facts. The trial court granted summary judgment in favor of the DOT, however, and plaintiff appealed.

White, Allen, Hooten & Hodges, P.A., by John C. Archie, for plaintiff.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for defendant.

WELLS, Judge.

[1] We address first the DOT's cross assignment of error that service of process was not timely and that the court erred in denying its motion to dismiss. The state has consented to suit on highway contract claims. N.C. Gen. Stat. § 136-29 (1981 and Cum. Supp. 1983). Such a suit is timely filed if instituted by filing of complaint and issuance of summons within six months after the final decision of the State Highway Administrator denying the claim. *Id.* Plaintiff filed its complaint, and summons issued, within the time set by statute. However, the summons was not properly served on the DOT's registered process agent or the Attorney General as required by N.C. Gen. Stat. § 1A-1, Rule 4(j)(4) of the Rules of Civil Procedure (1983). After the six-month period had expired, but only 30 days after issuance of the original summons, the DOT moved to dismiss. Five days later, and 35 days after issuance of the original summons, plaintiff obtained an alias or pluries summons which was properly served in due time on the DOT. The trial court ruled that the alias summons continued the action and denied the DOT's motion. We affirm that ruling.

G.S. § 136-29 only requires institution of the civil action, not service of process, within six months. N.C. Gen. Stat. § 1A-1, Rule 4(d) of the Rules of Civil Procedure (1983) provides that a civil action may be continued in existence against "*any* defendant" (emphasis added) by suing out alias summons within 90 days of the last preceding summons. No special attention to this rule appears for suits against the state, nor does this civil action appear to be any different from other civil actions. The state, once it has con-

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sented to suit, occupies the same position as any other litigant. *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976). There is no indication that the original summons designated the wrong defendant, only that it was incorrectly served. Compare *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982) (correcting summons to name correct defendant institution of new action). We therefore hold that although the first service was of no effect, *Stone v. Hicks*, 45 N.C. App. 66, 262 S.E. 2d 318 (1980), plaintiff timely continued its action in existence and dismissal was improper. Rule 4(d); *Williams v. Bray*, 273 N.C. 198, 159 S.E. 2d 556 (1968); see also *Consolidation Coal Co. v. Disabled Miners of So. W. Va.*, 442 F. 2d 1261 (4th Cir.), cert. denied, 404 U.S. 911 (1971) (error to dismiss where second, correct service timely). The court had jurisdiction and correctly denied the DOT's motion.

Turning now to the merits, we note that summary judgment may be granted to the non-moving party in appropriate cases. *A-S-P Associates v. City of Raleigh*, 38 N.C. App. 271, 247 S.E. 2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E. 2d 444 (1979). Where dispute arises only as to questions of law, summary judgment is appropriate. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Both parties concede in their briefs that there is no dispute concerning any material fact. "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning." *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973); see also *Salvation Army v. Welfare*, 63 N.C. App. 156, 303 S.E. 2d 658 (1983), disc. rev. denied, 311 N.C. 306, 317 S.E. 2d 682 (1984); 4 S. Williston, *Law of Contracts* § 616 (3d ed. 1961); Restatement (Second) of Contracts § 200, Comment c. (1981). Since this contract is in writing, and the facts are undisputed, its legal effect was for the court and summary judgment was appropriate.

[2] Plaintiff's position is simple: since the contract expressly provides that there will be a 180-day inspection period *after* the intermediate completion date, the DOT, in adjusting the intermediate date, was required to correspondingly adjust the final contract completion date to reflect the 180-day interval. Therefore, plaintiff and not the DOT was entitled to judgment. We disagree.

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First, the contract sets intermediate and final contract time separately, and sets liquidated damages separately for overruns of each date. Second, it separately provides that intermediate completion dates "may be extended on the same basis as [final] completion dates" Nowhere does the contract require that extensions to the intermediate date be matched exactly by extensions to the final date. Rather, it simply provides that such extensions *may* be made. Third, it provides that extensions of time or remittances of damages for delay shall be "only to the extent and in the proportion that such delays were caused by the conditions set forth in [the section describing good cause for which the DOT would grant extensions]." The contract thus clearly reflects an intent to allow the DOT discretion in adjusting extensions to avoid unfairness.

The undisputed facts show that even before its request for an extension, plaintiff had accepted unequal extensions of the intermediate and final dates. In fact, the original dates agreed upon were 166 days apart, although the DOT later adjusted the final contract date to reflect the proper interval as part of its response to plaintiff's original verified claim. Plaintiff then stipulated to separate groups of "authorized time extensions" for the two contract dates. Only one of the items appears as an extension to both dates. The major item of difference, a 90-day winter weather extension, was added only to the intermediate date in adherence to the terms of the contract, which provides that upon authorized extension beyond 15 December the 90 days is added automatically to the contract time. The final contract date, however, was not extended beyond 15 December and thus did not receive the 90-day extension. Plaintiff does not object to this discrepancy, insisting instead on the inflexibility of the 180-day interval.

It is apparent however from both the plaintiff's claim and the DOT's answers to interrogatories that adjustments to contract time reflect in large part contract, and not actual, time. By the time plaintiff submitted its claim, it had already completed the work, subject only to possible correction of pavement markings. Plaintiff was already in breach under the terms of the contract; allowing extensions served only to reduce the amount of damages assessed, not to extend time to complete the work. Even accepting plaintiff's requested extensions *in toto*, substantial damages would still be due. The distinction between contract time and ac-

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tual time is crucial. We note that the DOT, in adjusting contract time, did correct the original mistake in setting the interval 166 days. Contract time thus properly allowed 180 days. The adjustments made, while generally reflecting actual delays, did not correspond exactly to work in the field as plaintiff contends.

The 90-day adjustment mentioned above is one example; plaintiff received it even though it is clear from the record that work continued during the period 15 December-16 March. Plaintiff arrived at several components of its request for extension not by computing actual delays, but by calculations such as multiplying the ratio (cost overruns/contract price) times contract time to arrive at an estimated extension, or by estimating production percentage shortfalls and requesting extensions by multiplying that percentage times the days of production slowdown. Of special note in light of plaintiff's present position is its request, thus arrived at, for a 192-day interval between the intermediate and final contract dates.

The DOT's explanations for the extensions allowed similarly reflect contract adjustments. The DOT adopted the same methodology as plaintiff in computing overrun and underrun extensions. It used a "theoretical pro rata basis" in these calculations. In addition it adjusted the final date based on percentage modifications of the arbitrary winter extension period. It is clear from all this evidence that the adjustments in contract time after breach were to properly adjust damages, not to change actual time of performance.

Plaintiff does not contend that any of the extensions granted by the DOT are unjustifiably small. Nor does it contend that any specific adjustment should have been made which was not made. Nor does it contend that by assessing liquidated damages for overruns of both the intermediate and final contract dates, the DOT unfairly doubled the damages. It admits that the erroneous interval in the original contract has been corrected. Its only contention, simply put, is that, having received a more favorable extension of the intermediate date than the final date, it is entitled to an equal adjustment to the final date. In light of the distinction between contract time and actual time discussed above, the DOT could have simply used its "theoretical pro rata" extensions and the like to add extension days *equally* to both dates, leaving the

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same number of days' delay and yet keeping the 180-day interval. Under the circumstances, we conclude that on this record, defendant was entitled to summary judgment.

Affirmed.

Judges ARNOLD and BECTON concur.

HUGH W. JOHNSTON AND AUDREY S. JOHNSTON v. GASTON COUNTY, MARTIN EUDY, THE TAX SUPERVISOR FOR GASTON COUNTY, AND TRUMBLE-McGUIRK & ASSOCIATES, A DIVISION OF COLE-LAYER-TRUMBLE COMPANY, AND THE OHIO CASUALTY INSURANCE COMPANY, AN OHIO CORPORATION

No. 8327SC1293

(Filed 18 December 1984)

1. Taxation § 25.11— property assessment contested in Property Tax Commission—Court of Appeals exclusive mode of judicial review

Taxpayers who did not perfect an appeal from the Property Tax Commission to the Court of Appeals may not seek judicial review of the Property Tax Commission's decision in superior court. G.S. 105-345 bypasses the North Carolina Administrative Procedure Act and makes the Court of Appeals the exclusive mode of judicial review for property tax assessments contested in the County Board and Property Tax Commission. G.S. 150A-43 to -52 (1978), G.S. 105-322(g)(2).

2. Taxation § 25.11— allegations necessary for direct review of assessment in superior or district court

A complaint filed in superior court challenging a property tax assessment was properly dismissed where it lacked allegations that the taxpayer had paid taxes due and filed a statement of valid defense and a request for release or refund of the tax with the governing body of the taxing unit. Those steps are required by G.S. 105-381 for direct judicial review in superior or district court of a property tax assessment.

3. Constitutional Law § 23.3— property tax assessment—42 U.S.C. 1983 action—state remedy adequate

A complaint challenging a property tax assessment, filed in superior court and alleging violations of due process and equal protection under 42 U.S.C. 1983, was properly dismissed because North Carolina's property tax statutes provide a "plain, adequate and complete" remedy which plaintiffs did not follow. G.S. 105-345.2(b), G.S. 105-381, G.S. 1A-1, Rule 12(b)(6).

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APPEAL by plaintiffs from *Sitton, Judge*. Judgment entered 21 October 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 25 September 1984.

This cases arises out of an appraisal of plaintiffs' real property, conducted by appraisers hired by Gaston County. Plaintiffs have challenged the appraisal, alleging that their property was valued at a higher percentage of its true value than other property in Gaston County. Plaintiff Hugh Johnston contested the appraisal before the Gaston County Board of Equalization and Review on 19 May 1981. The Board upheld the appraisal. On 30 June 1981, Johnston appealed the Board's ruling to the North Carolina Property Tax Commission. The Commission heard Johnston's appeal in December 1982 and dismissed it, holding that Johnston failed to carry his burden of rebutting the presumption that Gaston County's appraisal was correct.

In January 1983, Johnston gave notice of appeal to the North Carolina Court of Appeals, and simultaneously filed a motion with the Commission for further hearing, which was denied. Johnston failed to perfect the appeal to the Court of Appeals. Rather, he and his wife filed the present suit in Superior Court of Gaston County against Gaston County, its Tax Supervisor, and the firm of appraisers hired by the County to conduct the reappraisal. The Johnstons claim that the appraisal of their property conducted by defendants was not done in accord with North Carolina statute and violated their rights guaranteed by the United States and North Carolina Constitutions. They base the present suit primarily on 42 U.S.C. 1983, which gives a cause of action to those deprived of federal constitutional and statutory rights by persons acting under color of state law. The defendants filed motions to dismiss, and the trial judge granted these motions. Plaintiffs now appeal the dismissal of their action in Gaston County Superior Court.

Basil L. Whitener and Anne M. Lamm for plaintiff appellants.

Stott, Hollowell, Palmer & Windham, by Grady B. Stott and Jeffrey M. Trepel, for defendant appellees Gaston County and Martin Eudy.

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Mullen, Holland & Cooper, by Graham C. Mullen and William E. Moore, Jr., for defendant appellees Trumble-McGuirk and Ohio Casualty Insurance Company.

ARNOLD, Judge.

The primary issue in this case is: where should the plaintiffs have pursued their claim that Gaston County through its appraisers overvalued their property? The plaintiffs say that they now have a right of action in Gaston County Superior Court, while the defendants say that the plaintiffs do not have such a right, but only could have appealed from the ruling of the Property Tax Commission to the Court of Appeals.

[1] North Carolina law provides two avenues by which a taxpayer may seek relief from an unjust property tax assessment: administrative review followed by judicial review in the Court of Appeals, and direct judicial review in Superior or District Court. Administrative review begins in the County Board of Equalization and Review. The County Board has jurisdiction to hear any taxpayer who has a complaint as to the listing or appraisal of his or others' property. *See* G.S. 105-322(g)(2). Any taxpayer who wishes to except to an order of the County Board shall appeal to the State Property Tax Commission. G.S. 105-324. In turn, a taxpayer who is unsatisfied with the decision of the Property Tax Commission shall appeal to the North Carolina Court of Appeals, G.S. 105-345, and then to the North Carolina Supreme Court, G.S. 105-345.4. Sections (d) and (e) of G.S. 105-345 provide:

(d) The appeal *shall* lie to the Court of Appeals as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

(e) The Court of Appeals *shall hear and determine all matters arising on such appeal*, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals. (Emphasis added.)

The scope of review before the Court of Appeals is set out in G.S. 105-345.2:

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules

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of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, *interpret constitutional and statutory provisions*, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or *it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:*

- (1) *In violation of constitutional provisions; or*
- (2) *In excess of statutory authority or jurisdiction of the Commission; or*
- (3) *Made upon unlawful proceedings; or*
- (4) *Affected by other errors of law; or*
- (5) *Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or*
- (6) *Arbitrary or capricious. (Emphasis added.)*

We take G.S. 105-345(d), which provides that "appeal *shall* lie to the Court of Appeals," and G.S. 105-345.2(b), which describes the breadth of review by the Court of Appeals, to indicate that the General Assembly intended such appeal to be the exclusive mode of judicial review of property tax assessments contested in the County Board and Property Tax Commission. Section 105-345, enacted in 1979, effectively bypassed the North Carolina Administrative Procedure Act's provision for judicial review in Superior Court for persons aggrieved by a "final agency decision." G.S. 150A-45; G.S. 150A-43 to -52 (1978). Thus, under North Carolina statute plaintiffs clearly could not seek judicial review of the Property Tax Commission's decision in Superior Court.

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[2] Taxpayers in North Carolina have an alternative to administrative review. They can seek judicial review of an assessment directly in Superior or District Court by paying taxes and then bringing a suit against the taxing unit for recovery of taxes paid. G.S. 105-381. In order to have such an action, the taxpayer must first have filed a written statement of a valid defense to the tax with the governing body of the taxing unit and a request for release or refund of the tax. A "valid defense" is either that: (1) the tax was imposed through clerical error, (2) the tax was an "illegal tax," or (3) the tax was levied for an "illegal purpose." G.S. 105-381(a)(1). Within ninety days of receiving the taxpayer's statement and request, the governing body of the taxing unit must act. If it denies the request or does not act within that time, then the taxpayer may bring a civil suit, *provided he has paid the taxes assessed*. G.S. 105-381(c). The trial court will allow recovery of the taxes if it finds that one or more of the defenses exists. G.S. 105-381(d).

The plaintiffs in the case at bar have not based their action on G.S. 105-381. They do not allege in their complaint that they have paid taxes due, nor do they seek recovery of such taxes. Further, plaintiffs have not met the other procedural requirements of G.S. 105-381, including an allegation that they have a "valid defense" under G.S. 105-381(a)(1).

Thus, the plaintiffs have not followed the statutory procedures provided for property tax complaints in North Carolina, and their suit, as a matter of state administrative law, was properly dismissed.

[3] Plaintiffs, however, allege that because they have based their complaint on violations of federal law, they have a right to sue in Superior Court independent of their remedies in state law. In particular, plaintiffs claim that Gaston County officials and the appraisers they hired acted under color of state law to deprive plaintiffs of their rights to due process and equal protection. This gives plaintiffs a cause of action, they say, in state court under 42 U.S.C. 1983.

Plaintiffs correctly observe that the United States Supreme Court has recently held that comity bars taxpayers from bringing § 1983 suits to contest state property tax violations in federal courts. *See Fair Assessment in Real Estate Association v. Mc-*

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Nary, 454 U.S. 100, 70 L.Ed. 2d 271, 102 S.Ct. 177 (1981). Plaintiffs argue, however, that this means that the Supreme Court has implied that state courts are the only proper forums for § 1983 claims concerning property tax assessments. Our reading of the *Fair* case persuades us that the Supreme Court did not mean to go so far as to require that § 1983 actions, if not brought in federal courts, can only be resolved in state courts. The Supreme Court noted that in property tax cases, instead of pursuing § 1983 claims in federal courts:

[T]axpayers must seek protection of their federal rights by state remedies, *provided of course that those remedies are plain, adequate, and complete*, and may ultimately seek review of the state decisions in this Court.

Fair, 454 U.S. 100, 116 (emphasis added).

Although the Supreme Court did not decide the issue in *Fair*, it suggested that it would uphold a state remedy if it were adequate to protect plaintiffs' federal rights. Our review of North Carolina's property tax statutes convinces us that plaintiffs in this case do have such a "plain, adequate and complete" remedy. As noted above, Chapter 105 gives taxpayers a right to contest property tax valuations in the County Board and then in the State Property Tax Commission. Appeal lies to this Court, and then to the North Carolina Supreme Court. The statute empowers this Court to make an inquiry into constitutional matters, including, we believe, those plaintiffs have framed in their federal action. The statute provides that the Court "may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) in violation of constitutional provisions; or (2) in excess of statutory authority or jurisdiction of the Commission; or (3) made upon unlawful proceedings; or (4) affected by other errors of law. . . ." G.S. 105-345.2(b).

Moreover, if plaintiffs had paid taxes and brought an action against Gaston County to recover taxes paid pursuant to G.S. 105-381, then arguably they could have alleged that their property tax assessment was an "illegal tax."

Our review of plaintiffs' complaint indicates that they could have adhered to state law procedure for processing property tax

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complaints and still have pursued violations of their federal (and state) constitutional rights. The plaintiffs have failed to demonstrate that the remedies provided by state law are inadequate or unfair. Plaintiffs allege that neither the County Board nor the Property Tax Commission could have adequately dealt with their constitutional claims. This is true, see *Great American Insurance Co. v. Gold*, 254 N.C. 168, 118 S.E. 2d 792 (1961), but does not mean that those claims will never be heard. While constitutional claims will not be acted upon by administrative tribunals, such claims can be reserved for the Court of Appeals, which the statute empowers to hear them. This division of review, saving constitutional issues for the courts, does not unduly hinder or restrict the taxpayer in asserting his rights. Moreover, it advances the important state interests of efficiency and conservation of judicial resources by giving expert administrative officials an opportunity to discover and redress technical errors in appraisal before the difficult legal issues are addressed.

Finally, we note that plaintiffs have cited *Snuggs v. Stanly County Department of Public Health*, 63 N.C. App. 86, 303 S.E. 2d 646 (1983), for the proposition that plaintiffs may bring a § 1983 action in the state courts. Yet, in *Snuggs* this Court relied upon *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979), to hold that § 1983 actions were properly dismissed in Superior Court for lack of subject matter jurisdiction when the plaintiffs failed to exhaust their statutory administrative remedies. On discretionary review, the Supreme Court modified *Snuggs*, treating defendants' motions as motions to dismiss for failure to state a claim upon which relief can be granted. *Snuggs v. Stanly County Department of Public Health*, 310 N.C. 739, 314 S.E. 2d 528 (1984). It then granted these motions because of plaintiffs' failure to allege that they did not have adequate remedies at state law. *Snuggs*, 310 N.C. at 741, 314 S.E. 2d at 529.

Although the plaintiffs in the present case made some attempt to allege that they had inadequate remedies under state law, they apparently did not consider the breadth of review in this court and therefore failed to convince us of the futility of pursuing their constitutional claims through the statutory property tax review process. Plaintiffs' claim was therefore dismissed properly under Rule 12(b), although the trial court should have relied specifically on Rule 12(b)(6): failure to state a claim upon which

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relief can be granted. We remand to the trial court for the entry of a more detailed order. Plaintiffs shall be allowed thirty days from the date of this opinion within which to file amended complaints in Superior Court.

Affirmed and remanded.

Judges WELLS and HILL concur.

IN THE MATTER OF THE WILL OF ZELLA MAY (MAE) LEONARD, DE-
CEASED

No. 8422SC55

(Filed 18 December 1984)

Wills § 24— caveat proceeding—repugnant verdict—new trial on all issues

There was an irreconcilable repugnance in the jury's verdict in a caveat proceeding where the jury answered affirmatively an issue as to whether the paper writing purported to be a holographic will was executed according to the requirements of the law but answered negatively a second issue as to whether the paper writing was the last will and testament of decedent, and the trial court did not err in setting aside the verdict and ordering a new trial on all issues because of the contradictory answers to the issues and because of the jury's disregard of the court's instructions to answer the second issue "yes" if they answered the first issue "yes." G.S. 1A-1, Rule 59.

APPEAL by caveator, Roby C. Leonard, and cross appeal by propounder, Dorothy May Leonard Dillard, from *Morgan, Judge*. Judgment entered 7 October 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 19 October 1984.

This is a will caveat proceeding in which Roby C. Leonard (caveator) contests the validity of a handwritten document admitted for probate by the Davidson County Clerk of Superior Court as the holographic will of Zella May (Mae) Leonard (decedent). The purported will was filed for probate by Dorothy May Leonard Dillard (propounder) on 4 June 1982. This caveat was filed 17 December 1982.

The essential facts are:

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Decedent passed away in her home at 933 South Main Street in Lexington on 26 May 1982 leaving two children, caveator and propounder. On 31 May 1982 propounder returned to decedent's home and began to "go through" or "look at" things in the house. Propounder testified that she found the purported holographic will in a sealed envelope which was found in decedent's mother's pocketbook. The pocketbook was found in a walnut wardrobe. Also within this pocketbook were settlement papers of two estates. Property deeds, receipts, decedent's bankbook and her money were also found in the walnut wardrobe.

The writing on the purported holographic will, except for the date, and the writing on the envelope containing it was the handwriting of decedent in the opinion of all witnesses.

Caveator presented evidence that the date on the purported holographic will was not in the handwriting of decedent through expert testimony. The expert, Nell Lewis, testified that in her opinion, "the date of September 3, 1980 on the paper writing was not written by the same person who wrote the body of the document and who wrote the envelope." The expert also testified that the envelope containing the document had never been sealed. The expert further described the envelope as being very old and crumpled with creases across it. The document itself was also crumpled.

The following issues were tendered to the jury:

(1) Was the paper writing identified as propounder's exhibit 1 executed by Zella May (Mae) Leonard according to the requirements of the law for a valid last will and testament?

The jury answered this issue "Yes."

(2) Is the paper writing and every part thereof, the last will and testament of Zella May (Mae) Leonard?

The jury answered this issue "No."

Upon discharge of the jury, propounder moved to set aside the verdict as to issue number two on the grounds that the answer was inconsistent with the answer to issue number one and contrary to law. Propounder also moved for a new trial as to issue number two on the grounds of the jury's manifest disregard

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of the court's instructions, insufficiency of the evidence and that the verdict was contrary to law.

The trial court, partly on motion of propounder and partly upon its own motion, set aside the verdict and ordered a new trial on all issues. In its order the court noted that the verdict was set aside because of the contradictory answers to issues one and two, and the new trial was ordered pursuant to Rule 59 on the grounds of manifest disregard by the jury of the court's instructions, insufficiency of the evidence to justify the jury's answer, the inconsistency of the verdict and that the evidence was contrary to law.

The court also indicated in its order that it failed to instruct the jury that if they should answer the first issue yes, that they must answer the second issue yes. The record indicates, however, that this instruction was properly given.

Caveator appeals, propounder cross appeals.

Wilson, Biesecker, Tripp and Sink, by Joe E. Biesecker, for caveator-appellant.

Brinkley, Walser, McGirt, Miller and Smith, by Charles H. McGirt and Stephen W. Coles, for propounder-appellee.

EAGLES, Judge.

In his brief on appeal caveator asserts that he assigns as error the trial court's setting aside of the verdict in issue number two which deals with whether the entire handwritten document is the last will and testament of decedent. However, this varies from the assignment of error as it appears in the record on appeal. There, caveator assigned as error the setting aside of the entire verdict and the granting of a new trial on all issues, arguing that the jury's answers to the issues were not inconsistent and that the jury had not manifestly disregarded the trial court's instructions.

"The scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal." Rule 10, Rules of Appellate Procedure. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authori-

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ty cited, will be taken as abandoned." Rule 28, Rules of Appellate Procedure. For this reason, caveator's assignment of error as to the trial court's setting aside the entire verdict and ordering a new trial is not properly before us.

Assuming, arguendo, that the issue is properly before this court, we note that caveator's argument that the trial court should have submitted only one issue as to *devisavit vel non* is not persuasive. The basis of caveator's argument is that *devisavit vel non* was the main issue to be decided by the jury. In support of his contention, caveator cites *Fraser v. Jennison*, 106 U.S. 191 (1882), that only one issue should be submitted to the jury. *Jennison* is based exclusively on Michigan law and is not controlling in North Carolina.

Professor Wiggins, in his authoritative treatise on wills and administration of decedent's estates in North Carolina writes:

Devisavit vel non is the primary issue when the will is contested; and when this issue is submitted to the jury, the court is not compelled to submit additional issues covering the separate grounds upon which the caveat is based. However, when separate issues would aid the jury in its task, these should be framed and submitted by the trial judge. 1 Wiggins, *Wills and Administration of Estates in North Carolina*, Section 125 (2d Ed. 1983).

While not compelled to submit additional issues to the jury, the trial court properly could do so in an effort to aid the jury in its task.

Here, the trial court undertook to set out the two issues pursuant to our Pattern Jury Instructions, N.C.P.I.—Civil, 860.00, 860.25 (1975). We have previously observed that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions. *State v. Bethea*, 71 N.C. App. 125, 321 S.E. 2d 520 (1984).

Caveator notes correctly that this proceeding does not involve issues of undue influence or the mental capacity of the decedent to make a will, however, the pattern jury instructions suggest two additional issues to be resolved. N.C.P.I.—Civil 860.00, 860.25 (1975):

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(1) Whether the paper writing purported to be a holographic will was executed according to the requirement of law, and

(2) Whether the paper writing and every part thereof is the last will and testament of the decedent.

The second issue is *devisavit vel non*, but the jury must answer the first issue in the affirmative before it can answer the second issue in the affirmative. *In Re Will of Sessoms*, 254 N.C. 369, 119 S.E. 2d 193 (1961). Since the jury found affirmatively that the paper writing was executed according to the requirements of law, the jury should also have determined that the paper writing was the last will and testament of decedent. The jury answered this issue in the negative. As such, the verdicts on the two issues were contradictory and cannot stand.

This case is similar to *In Re Will of Henderson*, 201 N.C. 759, 161 S.E. 387 (1931). There, the jury found in response to the first issue that the paper writing and every part thereof was the last will and testament of John R. Henderson. Nevertheless, in response to a third issue, the jury found that John R. Henderson did not have sufficient mental capacity to make a will. As noted by the *Henderson* court:

The result is that the first issue finds the will to be valid, and the third issue finds it to be invalid . . . It is manifest, therefore, that the verdict is materially repugnant . . . The jury cannot find both for the plaintiff and the defendant on the same issue, as for instance, by a verdict giving the plaintiff damages and finding the defendant not guilty.

201 N.C. at 761, 161 S.E. at 388.

Holding that the verdict there was uncertain and ambiguous, the *Henderson* court ordered a new trial as to *all* issues. *Id.* 201 N.C. at 761, 161 S.E. at 388. The trial court did as much in the case at bar. We note that G.S. 1A-1, Rule 59, permits the trial court on its own motion to order a new trial for manifest disregard by the jury of the instructions of the court. Our examination of the record indicates that the trial court did instruct the jury that:

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[I]f you find that the paper writing was executed according to the requirements of the law, then I instruct you that you will answer [issue number two] yes.

This instruction is found in the transcript of trial at pages 207-208. The jury answered issue one "yes" and issue two "no." As such, there is a manifest disregard of jury instructions for which the trial court could, in its discretion, order a new trial. Absent an abuse of discretion, the trial court's order of a new trial is not subject to review here. *In Re Will of Herring*, 19 N.C. App. 357, 198 S.E. 2d 737 (1973).

The trial court noted in its order that it was without authority to change the jury's verdict and enter a verdict of its own. It is a cardinal rule that the judgment must follow the verdict. *Industrial Circuits Co. v. Terminal Communications, Inc.*, 26 N.C. App. 536, 216 S.E. 2d 919 (1975). When an irreconcilable repugnance in the verdict exists, it is not the function of the court to enter a judgment *non obstante veredicto* on one issue and ignore the other. Where the answers to the issues are so contradictory as to invalidate the judgment, the role of the court is to grant a new trial because of the evident confusion of the jury. *Palmer v. Jennette*, 227 N.C. 377, 42 S.E. 2d 345 (1947). While a trial court may set aside a verdict and vacate the answer to a particular issue when to do so does not affect or alter the impact of answers to other issues, the trial court may not remove an irreconcilable repugnancy in the verdict by vacating a part thereof. This is a matter exclusively for the jury. *Lee v. Rhodes*, 230 N.C. 190, 52 S.E. 2d 674 (1949). Had the inconsistency been called to the attention of the jury before the verdict was accepted, they could have reconsidered their verdict and resolved the inconsistency. The trial court, in its discretion, ordered a new trial instead.

For these reasons, the order of the trial court is affirmed. Our disposition of this case makes it unnecessary to consider proponent's and caveator's remaining assignments of error.

Affirmed.

Judges WEBB and BRASWELL concur.

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STATE OF NORTH CAROLINA v. DENNIS "BUCKWHEAT" McENTIRE

No. 8429SC199

(Filed 18 December 1984)

1. Constitutional Law § 48— ineffective assistance of counsel—failure to interview and summon witnesses before trial

Defendant did not have reasonably effective assistance of counsel where defense counsel failed to interview potential witnesses prior to trial, failed to take timely steps to bring them to court, and interviewed defense witnesses in court within hearing of the prosecutor. The conclusion that there is a reasonable probability that a different result would have been reached without counsel's errors is supported by the difficulty the jury had in reaching its verdict and by the inconsistent split verdict rendered.

2. Criminal Law § 122.2— additional remarks on failure to reach verdict—improper

A new trial was in order where the jury deliberated for five hours, the foreman reported a wide numerical split and stated that the jury would have a hard time being unanimous, the court asked that the jury continue trying to reach unanimous verdicts, and the jury returned after 24 minutes with a split verdict inconsistent with the facts of the case. G.S. 15A-1235(b), Art. I, § 24 N.C. Constitution.

APPEAL by defendant from *Grist, Judge*. Judgment entered 20 October 1983 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 18 October 1984.

The defendant was charged with felonious breaking or entering and felonious larceny from the person. The State's evidence was based primarily on the testimony of the alleged victim, David Baber. Mr. Baber testified that he was awakened early the morning of 22 June 1983 by a smoke alarm. He stated that the alarm had been triggered by a fire burning in his bedroom window curtain, set by the defendant. He observed the defendant and two other persons backing a pickup truck up to the bedroom window. Defendant then climbed into the bedroom window. Baber testified that on seeing the defendant he leaped from bed and ran out the front door. Defendant chased him, knocked him down, and took his wallet, which contained five dollars. Baber alleged that when he returned to his house, four cans of pork and beans, a transistor radio worth \$100, and a loaf of bread were missing.

When called to present evidence, the defense counsel responded that several of the defense witnesses were absent. He

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first said they had no transportation. He then admitted that they had not been served with subpoenas. Two of the subpoenas had just been drawn up that day, and a third had not been properly delivered to the Sheriff's Department and accordingly had not been served. The trial court secured a list of missing witnesses from the defense counsel and asked counsel whether he wanted to request any other witnesses. The defendant mentioned his sister, Debbie McEntire. The defense counsel said he did not know how she would testify. The court suggested that she might testify that she accompanied defendant to the scene of the crime, and the defense counsel admitted that that was possible. The court then sent sheriff's deputies to locate defendant's witnesses.

When defendant's sister arrived at the courtroom, the defense counsel interviewed her with the prosecuting attorney within hearing distance. After she testified, the prosecutor questioned her about statements he had overheard her make a few minutes earlier to the defense attorney.

The defendant took the stand and denied Mr. Baber's accusations. He claimed to have been at home in bed at the time Mr. Baber alleged he broke into his house. Defendant stated also that he and Mr. Baber knew each other, and that he and Mr. Baber had had an argument early on the evening of 21 June 1983. Defendant stated that he believed Mr. Baber's hard feelings about this incident caused him to accuse defendant falsely of the crimes charged.

The jury retired to deliberate. After two hours of deliberation, without a verdict being reached, court was recessed for the day. The next morning the jury deliberated three hours, and then was brought to the courtroom. The judge asked as to the numerical division of the jury, and inquired whether progress was being made. The foreman replied that the jury was at a standstill, and that the members would have a hard time being unanimous under the circumstances. The judge told the jury that he did not want to "lean on" them "too heavy" or do anything to make them "go against their consciences," but urged them to continue deliberating. Eventually the jury agreed to return to deliberations after a recess. After 24 minutes of further deliberation, it found the defendant not guilty of breaking and entering, but guilty of robbery of the person.

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Defendant was sentenced to the presumptive term of three years in prison. He appeals his conviction.

Attorney General Rufus L. Edmisten, by Associate Attorney T. Byron Smith, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that he was denied effective assistance of counsel. He argues that his appointed counsel prepared inadequately for trial and conducted a preparatory interview with his alibi witness in the presence of the prosecutor. These omissions and mistakes, he says, caused him substantial prejudice at trial.

In assessing defendant's claim, we must determine, considering all the circumstances, whether his attorney rendered him "reasonably effective assistance." *Strickland v. Washington*, --- U.S. ---, 80 L.Ed. 2d 674, 693-94, 104 S.Ct. 2052, 2064-65 (1984). If defendant's attorney did not render such assistance, then we must determine whether prejudice resulted, i.e., whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Washington*, 80 L.Ed. at 698, 104 S.Ct. at 2068. Our analysis of "reasonably effective assistance" and prejudice reduces essentially to whether defendant's trial was fundamentally fair. Our purpose is to ascertain whether counsel's performance so handicapped the presentation of defendant's case and so impaired the functioning of the adversarial process that we cannot say with confidence that the trial produced a just result.

Defense counsel's handling of his client's case certainly left much to be desired. Counsel apparently failed to interview witnesses for defendant prior to trial, or to take timely steps to assure they would be present at trial. Two subpoenas were drawn up on the day of trial and another was not delivered properly to the Sheriff's office, so that it was never served. During the defendant's trial, the trial judge sent deputies out to locate witnesses and summon them to court.

When the witnesses eventually arrived, defense counsel attempted to ascertain how they would testify. He apparently did

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so within the hearing of the prosecutor. When one of the witnesses took the stand, the prosecutor sought to impeach her by referring to statements he had overheard a few minutes earlier.

Defense counsel did effectively cross-examine the State's witnesses, and also effectively examined his client and a police officer brought to the stand for the defense. Yet, we find that counsel's failure to interview potential witnesses prior to trial, his failure to take timely steps to bring them to court, and his interviewing of defense witnesses in court, within the hearing of the prosecutor, reflected not sound trial strategy, but serious neglect of his client's interests. In light of these circumstances, we cannot say that defendant received reasonably effective assistance of counsel.

Our analysis of whether defendant was rendered reasonably effective assistance virtually answers the second question, of whether defendant was prejudiced. The circumstances of this case indicate that counsel so compromised defendant's case that we cannot with confidence say that the adversary process produced a just result. Had counsel not made such unprofessional errors, a reasonable probability exists that the jury's verdict would have been different.

Our conclusion that there is a reasonable probability that a different result would have been reached is supported by the difficulty the jury had in reaching its verdict and by the inconsistency of the verdict itself, a split verdict, with the facts of the case as presented in the evidence.

[2] Defendant contends also that the trial judge's statements to the jury during deliberation, and especially his inquiry as to the jury's numerical division, were coercive and violative of the right to trial by jury guaranteed by Article I, § 24 of the North Carolina Constitution. We agree.

In *State v. Yarborough*, 64 N.C. App. 500, 307 S.E. 2d 794 (1983), this Court set out the standard for review in cases where the trial judge has inquired into a jury's numerical division. In that case, we declined to adopt a per se rule allowing a new trial each time such an inquiry is made, but observed that such an inquiry can, in certain circumstances, be useful. *Yarborough*, 64 N.C. App. at 502, 307 S.E. 2d at 795. To determine if it has caused

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undue pressure on the jury, however, we must "examine the trial judge's inquiry in context of the totality of the circumstances." *Id.*

In the case at bar, the jury had deliberated the afternoon of 19 October and the morning of 20 October without reaching a verdict. At 12:20 p.m. on 20 October, the jury returned to the courtroom, and a dialogue ensued between the foreman and judge. The judge said to the foreman, "Well, I haven't heard a knock on the door." The foreman replied, "That's right." The judge then said, "What about it, Mr. Foreman?" The foreman replied, "Your Honor, we're trying to be fair. All that's involved, it's a very unique problem."

The judge then asked the foreman to give him the division of the jury, without any indication which way the vote was going. The foreman reported votes on the two charges of 9-3, 8-4, and 10-2, 5-7. The foreman stated that the jury was "at a standstill," and that he felt that the jury "would have a hard time being unanimous under the circumstances." The trial court stated:

I don't want to lean on you too heavy. I don't want to make you do anything that would go against any of your consciences but if you think you can reach a verdict, we will let you try but if you don't think you can that's another problem. You've been out there now since yesterday about 2:30 until 5 yesterday and you've been out this morning from 9:30 to 12:30. Has there been any change in the vote in the last hour?

Foreman: Yes, your Honor.

The Court: Maybe you're making a little progress. Do you want to come back at 2 o'clock and try awhile longer? What do you all say? Let's make one more effort after 2 o'clock and if you feel like you can't reach unanimous verdicts in either one or both of these cases, then let us know, okay? We will take a recess now until 2 o'clock. Don't talk about the case during the recess and come back at 2 and we will go on a little further. Okay?

Thus, although the numerical split was fairly wide, and the foreman stated that the jury would have a hard time being unanimous, the court still desired that the jury should keep trying to reach unanimous verdicts. At this point in the deliberations, the

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judge could have, and perhaps should have, declared a mistrial. Admittedly, whether to go on was a matter within his discretion. In the circumstances of this case, however, if no mistrial was declared, the better practice would have been to stress more clearly that each juror must decide for himself and not surrender his convictions for the mere purpose of returning a verdict. Indeed, the best practice would have been simply to repeat in toto the instructions of G.S. 15A-1235(b). The judge's failure to do this, the fact that the verdicts were eventually reached only twenty-four minutes after the jury returned to deliberate (while the jury had deliberated up to that point for five hours), and the fact that the split verdict returned was inconsistent with the facts of the case, suggest that the judge's remarks did influence certain members of the jury to agree, against their consciences, to unanimous verdicts. In the context of the totality of the circumstances, we find that the trial judge's remarks so influenced the jury that a new trial is in order.

New trial.

Judges WELLS and HILL concur.

UNIGARD MUTUAL INSURANCE COMPANY v. JOHN RANDOLPH INGRAM,
COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA

No. 8410SC177

(Filed 18 December 1984)

1. Insurance § 79.1— insurance rate case—scope of review

The scope of review of an automobile liability insurance rate case is that provided by G.S. 150A-51.

2. Insurance § 79.1— automobile liability insurance—requests for deviation from rates—clean risks ceded to Reinsurance Facility

In ruling upon an insurance company's request pursuant to G.S. 58-124.23 for deviation from automobile liability rates established by the Rate Bureau, the Commissioner of Insurance exceeded his statutory authority in extending the requested rate deviation to "clean risks" ceded to the N.C. Reinsurance Facility. G.S. 58-248.33(1).

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APPEAL by respondent from *Beaty, Judge*. Judgment entered 12 January 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1984.

This is a civil action wherein petitioner, Unigard Mutual Insurance Company, seeks a declaratory judgment concerning the validity and effect of certain actions taken by respondent, Commissioner of Insurance, in connection with petitioner's request pursuant to N.C. Gen. Stat. Sec. 58-124.23 for deviation from basic rates. On 12 January 1984 Judge Beaty entered an order declaring that the Commissioner exceeded his statutory authority in taking the action challenged by petitioner; the court also declared that the approval of petitioner's deviation request was otherwise proper, valid, and effective. Respondent Commissioner of Insurance appealed.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Henry A. Mitchell, Jr., and Julian D. Bobbitt, Jr., for petitioner, appellee.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for respondent, appellant.

HEDRICK, Judge.

The record reveals the following undisputed facts:

Under North Carolina law an insurance company doing business in this State is required to insure all applicants for motor vehicle liability insurance. When a particular applicant is judged by the insurance company to present an unacceptable risk, the company is permitted by statute to "cede" the risk of loss on that insured to the North Carolina Motor Vehicle Reinsurance Facility. When a policy is ceded to the Facility, premiums are paid to the Facility, less an "expense allowance" provided to the insurance company as reimbursement for costs incurred in establishing, maintaining, and servicing the policies ceded to the Facility. When a loss arises on a ceded policy, the company issuing the policy pays the claim and is reimbursed by the Facility. Under G.S. 58-248.33(1) the Facility is, as a general rule having one exception, to set rates on ceded policies "insofar as is possible, to produce neither a profit nor a loss." All insurance companies writing automobile liability insurance in this State are

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required to be members of the Facility. When Facility rates are insufficient to offset losses arising out of ceded policies, such losses are to be "equitably share[d]" by member companies.

Under North Carolina law, automobile insurance rates applicable to the "voluntary" market (i.e., policies issued to insureds deemed "acceptable risks" by a company and thus not ceded to the Facility) are set by the North Carolina Rate Bureau. G.S. 58-124.23 permits companies that desire to do so to deviate from the rates established by the Rate Bureau upon filing a request for such deviation with the Commissioner. The statute provides that the Commissioner "shall approve proposed deviations if the same do not render the rates excessive, inadequate or unfairly discriminatory."

On 1 June 1982 Unigard filed a request for deviation from basic rates with the Commissioner pursuant to G.S. 58-124.23. On 10 June 1982 respondent ruled on petitioner's request in a letter, included in the record on appeal, and quoted below in pertinent part:

Approval is given to your request of June 1, 1982 for a deviation from the rates of the N.C. Rate Bureau as follows:

. . .

10% on non-fleet private passenger auto bodily injury and property damage liability and medical pay voluntary and "clean" ceded risks;

On 7 July 1982 petitioner submitted to respondent a written request that the Commissioner "amend certain portions of its approval letter . . . which relates to extending the insurance rate deviation requested by Unigard to private passenger automobile insurance risks ceded to the North Carolina Reinsurance Facility." On 12 July 1982 Unigard filed a complaint in Superior Court, Wake County, seeking review of respondent's decision pursuant to G.S. 58-9.3 and G.S. 150A-43, a declaratory judgment under G.S. 1-253, and issuance of a temporary restraining order, preliminary injunction, and stay pursuant to G.S. 1A-1, Rule 65, N.C. Rules Civ. Pro., G.S. 58-9.3, and G.S. 150A-48. A temporary restraining order and stay issued that same day, and on 19 July a preliminary injunction and stay issued. On 9 January 1984 following several extensions of time stipulated to by all parties, re-

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spondent filed an "answer and counterclaim for declaratory relief." On 12 January 1984 the matter came on for hearing, the trial court considering "the pleadings, the Stipulation of Facts, other matters of record and oral and written arguments of counsel." After making "Findings of Fact" virtually identical to those contained in the "Stipulation of Facts," signed by the parties and filed 12 January, Judge Beaty made conclusions of law and entered an order, quoted in pertinent part below:

CONCLUSIONS OF LAW

. . .

2. Respondent John Randolph Ingram, Commissioner of Insurance of the State of North Carolina, exceeded his statutory authority in modifying and extending the deviation in requiring the deviation to cover "clean risks" ceded to the North Carolina Reinsurance Facility . . . and the purported modification and addition is invalid.

3. Neither G.S. Sec. 58-248.33(1), G.S. Sec. 58-124.23 nor any other provision of the General Statutes of North Carolina permit the extension of deviations applicable to voluntary market insureds to any other insureds, whether "clean risk" or otherwise, which are ceded to the North Carolina Reinsurance Facility.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, DECREED AND DECLARED, that:

1. The deviation approval approving petitioner's deviation filing relating to deviation from rates for premiums from the types of insurance in its insurance package program, including "voluntary" private passenger non-fleet automobile insurance, is proper, valid and effective.

2. The added portion of this deviation approval which relates to petitioner's ceded "clean" risks on its "non-voluntary" automobile insurance business . . . is contrary to law, invalid, and respondent, his agents, principal, employees and persons action [sic] on his behalf, directly or indirectly, are hereby enjoined from implementing, enforcing or otherwise acting upon said additions.

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[1] In determining the scope of our review in the instant case, we first turn to G.S. 58-9.3, which permits in certain cases a "person aggrieved" by an order or decision of the Commissioner of Insurance to petition for review of that decision in Superior Court. G.S. 58-9.3(b) provides that "[t]he order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. . . . The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only." This scope of review has been characterized by this Court as "somewhat limited" in comparison with the "substantially broader review . . . provided by G.S. Ch. 150A." *Insurance Co. v. Ingram, Comr. of Insurance*, 34 N.C. App. 619, 635, 240 S.E. 2d 460, 469 (1977). G.S. 150A-43 provides that a person aggrieved by a final agency decision "is entitled to judicial review of such decision" under the Administrative Procedure Act "unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute." This Court has said that "adequate procedure for judicial review" under another statute exists only if the scope of review is equal to that set out in G.S. Ch. 150A, Art. 4. *Insur. Co.* at 635-36, 240 S.E. 2d at 470. Accordingly, our scope of review in the instant case is dictated by G.S. 150A-51. *Id.*; see also *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 394-96, 269 S.E. 2d 547, 558-59 (1980).

[2] Respondent assigns error to the court's conclusion that Commissioner Ingram "exceeded his statutory authority in modifying and extending the deviation in requiring the deviation to cover 'clean risks' ceded to the . . . Facility." The Commissioner's authority to act on deviation requests is set out in G.S. 58-124.23, which states: "The Commissioner shall approve proposed deviations if the same do not render the rates excessive, inadequate, or unfairly discriminatory." We agree with appellees that *Comr. of Ins. v. Rate Bureau*, 43 N.C. App. 715, 259 S.E. 2d 922 (1979), *disc. rev. denied*, 299 N.C. 735, 267 S.E. 2d 670 (1980), is persuasive authority on this issue. In that case the Court was confronted with an attempt by the Commissioner to modify a classification plan, submitted to the Commissioner by the Rate Bureau pursuant to G.S. 58-124.19 and 58-124.21. In holding the Commissioner's actions in excess of his statutory authority, this Court said:

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The legislative intent is clear. The Rate Bureau is vested with sole authority to determine rates and classifications for motor vehicle insurance, subject to review by the Commissioner. Upon his review, if the Commissioner disapproves the Bureau plan, he must specify "wherein and to what extent" he disapproves it, and he may set a date after which the filing will no longer be effective. He may not, however, submit his own proposals, whether they be deemed "modifications" or "substitutions." Nor may he order his scheme into effect. . . . The Commissioner is a creature of statute and, as such, he may act only to the extent and in the manner legislatively prescribed. . . .

Id. at 720-21, 259 S.E. 2d at 925-26. The Commissioner attempts to escape the application of this rule and bring his actions within the scope of his statutory authority by contending that "the filing did not specifically exclude 'clean risks' ceded to the Facility, and inasmuch as it was well known (to insurance companies, at least) that a lot of clean risks were in the Facility . . . the Commissioner was justified in concluding that the deviation proposal included 'proven safe drivers' in the Facility." We find this argument specious. Any misunderstanding under which respondent may have initially labored in regard to the precise parameters of Unigard's proposed deviation was clearly eliminated by petitioner's formal written request for amendment, quoted in part *supra*. However "justified" the Commissioner's initial conclusion, his ruling clearly amounts to a modification of the deviation request filed by petitioners and, as such, exceeds his statutory authority.

The Commissioner also assigns error to the trial court's conclusion that "extension of deviations applicable to voluntary market insureds to any other insureds, whether 'clean risk' or otherwise, which are ceded to the . . . Facility" is unauthorized by any statutory provision. We agree with the trial court's statement of the law. The statute permitting deviations from rates established by the Rate Bureau clearly applies only to the so-called "voluntary market." Indeed, under G.S. 58-248.33(1), rates on policies ceded to the Facility are not set by the Rate Bureau,

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but rather by the Facility.¹ G.S. Chap. 58, Article 25A, which sets forth the statutory scheme establishing and regulating the Facility, contains no reference to deviations, and our reading of that Article as a whole persuades us that the Legislature never contemplated that the deviation statute might be extended to rates set under Article 25A.

The judgment of the Superior Court is in all respects affirmed.

Affirmed.

Judges WEBB and HILL concur.

HERSCHEL H. HANEY, JR., ADMINISTRATOR OF THE ESTATE OF HERSCHEL H. HANEY, SR. v. DR. J. B. ALEXANDER, DR. H. N. LEE AND SOUTHEASTERN GENERAL HOSPITAL, INC.

No. 8416SC406

(Filed 18 December 1984)

1. Hospitals § 5— nursing malpractice—directed verdict for hospital improper

In a nursing malpractice action, directed verdict should not have been granted for defendant hospital where plaintiff qualified two expert witnesses who testified that plaintiff's father died due to defendant's failure to meet the applicable standard of health care. G.S. 90-21.12, G.S. 1A-1, Rule 50(a).

2. Physicians, Surgeons and Allied Professions § 15.2— nursing malpractice—doctors properly qualified as to standard of care

The trial court properly allowed two doctors to give their opinions as expert witnesses for plaintiff as to whether defendant hospital's nurses violated the applicable standard of care because both witnesses testified that they had taught and worked with nurses, that the nurses they had worked with had the same degree requirements and similar training to those who cared for plaintiff's father, and that there was no variation in the standard of care for all nurses in accredited hospitals across the country with respect to the basic

1. Rates set by the Rate Bureau may effectively establish rates for ceded policies in the case of "clean risk" insureds because of the following provision of G.S. 58-248.33(1): "[T]he rates made by or on behalf of the Facility with respect to 'clean risks' . . . shall not exceed the rates charged 'clean risks' who are not reinsured in the Facility." This provision, heavily relied on by respondent, in no way authorizes the extension of deviations to "clean risk" insureds within the Facility.

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duties at issue in this case. G.S. 90-21.12, Rule 10(d), North Carolina Rules of Appellate Procedure.

3. Physicians, Surgeons and Allied Professions § 11.1— nursing malpractice—national standard of care

Plaintiff's medical witnesses were qualified to testify in a nursing malpractice case despite their unfamiliarity with community standards for nursing care in Lumberton because they testified that the standard of care for the nursing duties at issue in this case was the same for nurses in accredited hospitals across the country.

4. Physicians, Surgeons and Allied Professions § 17— nursing malpractice—proximate cause—evidence sufficient

Plaintiff's evidence was sufficient to create an issue of proximate cause for the jury where plaintiff's experts testified that defendant's nurses were negligent in not monitoring their patient's blood pressure after his condition worsened, in not reporting to the patient's doctor a rise in pulse to 120, and in erroneously telling the doctor that the patient had not been given Librium when in fact he had.

APPEAL by plaintiff from *Smith, Judge*. Judgment entered 9 March 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 4 December 1984.

Plaintiff brought a wrongful death action on behalf of his father's estate, claiming that the negligence of the defendants proximately caused the death of his father. Plaintiff's father had driven himself to the emergency room of defendant hospital on 19 July 1977. Defendant Alexander examined him initially and diagnosed atrial fibrillation with marked hypertension. Dr. Alexander admitted plaintiff's father to the hospital and placed him on the drug Quinidine in an effort to control his abnormal heart rhythm. He showed signs of improvement the next morning, on 20 July 1977, when Dr. Alexander last saw him.

Defendant Lee was on call for Dr. Alexander during the evening of 20 July 1977 and the early morning hours of 21 July 1977, thereby assuming responsibility for the care of plaintiff's father. At 11:00 p.m. a nurse reported that plaintiff's father was nervous, dizzy, and sweaty with a pulse of 98 beats per minute. No mention was made of his blood pressure. Dr. Lee ordered that he be given a moderate dose of the sedative Librium. The Librium was administered but plaintiff's father continued to experience nervousness and sweatiness. His pulse rate increased to 120 beats per minute. An hour or so after the 11:00 p.m. call, a

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nurse informed Dr. Lee that the patient's symptoms persisted, although the nurse failed to report the increased pulse rate or any other vital signs. Upon being told that plaintiff's father had *not* been given Librium, Dr. Lee again ordered the sedative, and plaintiff's father received his second dose of Librium at 12:45 a.m. on 21 July 1977. Forty-five minutes later a nurse found him dead. An autopsy indicated that cardiac arrhythmia was the probable cause of death.

Defendants' motions for directed verdicts at the close of plaintiff's evidence were denied. Defendants Alexander and Lee presented evidence but defendant hospital did not. At the close of all the evidence the trial court again denied the motions by defendants Alexander and Lee for directed verdicts, but it granted a directed verdict in favor of defendant hospital. Both doctors subsequently reached a settlement with plaintiff, so the present appeal relates solely to defendant hospital (hereinafter, defendant).

McLeod & Senter, P.A., by John Michael Winesette, for plaintiff, appellant.

Harris, Cheshire, Leager & Southern, by W. C. Harris, Jr., and Claire L. Moritz, for defendant, appellee Southeastern General Hospital, Inc.

HEDRICK, Judge.

[1] Plaintiff's assignment of error raises the single question of whether the trial court properly directed a verdict for defendant under G.S. 1A-1, Rule 50(a). A directed verdict for defendant is proper only if plaintiff's evidence is insufficient as a matter of law to support his claim. In ruling on defendant's motion for directed verdict, the trial court must consider the evidence in the light most favorable to plaintiff and give plaintiff the benefit of every reasonable inference. *Willoughby v. Wilkins*, 65 N.C. App. 626, 631, 310 S.E. 2d 90, 94 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E. 2d 697, 698 (1984). "[T]he court must consider even 'incompetent' evidence in ruling on a motion for a directed verdict." *Hart v. Warren*, 46 N.C. App. 672, 678, 266 S.E. 2d 53, 58, *disc. rev. denied*, 301 N.C. 89 (1980) (citing *Koury v. Follo*, 272 N.C. 366, 158 S.E. 2d 548 (1968)). "The reason for this rule is that the admission of such [incompetent] evidence may have caused the plaintiff to

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omit competent evidence of the same import." *Huff v. Thornton*, 23 N.C. App. 388, 390, 209 S.E. 2d 401, 403 (1974), *affirmed*, 287 N.C. 1, 213 S.E. 2d 198 (1975).

Plaintiff in the present case qualified two expert witnesses, Drs. LeBeau and Rein, with regard to the standard of basic nursing care defendant owed to plaintiff's father under the medical malpractice statute, G.S. 90-21.12. These expert witnesses testified that plaintiff's father died due to defendant's failure to meet the applicable standard of health care. This testimony is sufficient to create a jury issue as to whether defendant failed to provide plaintiff's father with health care in accordance with the standards of practice among nurses with similar training and experience situated in the same or similar communities at the time of the act giving rise to the alleged cause of action, and as to whether defendant's alleged failure to provide appropriate health care proximately caused the death of plaintiff's father. Thus the judgment directing a verdict for defendant will be reversed and the cause remanded for a new trial.

[2] By its two cross-assignments of error defendant contends the trial court erred in allowing Drs. LeBeau and Rein to give their opinions as to whether defendant's nurses violated the relevant standard of care and thereby proximately caused the death of plaintiff's father. Rule 10(d), North Carolina Rules of Appellate Procedure, provides that an appellee may cross-assign as error "any action or omission of the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." Since, as pointed out above, there must be a new trial, it is not necessary for us to discuss these cross-assignments of error, but lest the parties misconstrue our failure to do so as a holding that the trial court erred in allowing the testimony in question, we hold the trial court did not err for the reasons that follow.

Defendant argues that plaintiff's expert witnesses, one of whom was an internist and cardiologist and the other of whom was a family practitioner, may have been medical experts in their respective fields but were not qualified as experts in the nursing standard of care applicable to defendant under G.S. 90-21.12, which provides:

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In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Nurses fall within the definition of "health care provider." G.S. 90-21.11. In order for plaintiff's medical witnesses to qualify as experts with regard to the nursing standard of care applicable to defendant, plaintiff was required under G.S. 90-21.12 to lay a foundation showing the witnesses were familiar with the standard of practice (1) among nurses with similar training and experience, (2) who were situated in the same or similar communities, (3) at the time plaintiff's father died. The trial court expressly qualified plaintiff's medical witnesses as experts, and implicitly qualified them as experts on the nursing standard of care applicable to this case by letting them testify on that subject over objection. "The competency of a witness to testify as an expert in the particular matter at issue is addressed primarily to the sound discretion of the trial court, and its determination is not ordinarily disturbed by the reviewing court." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 37, 265 S.E. 2d 123, 133 (1980) (citation omitted). We find that the trial court acted within its discretion in allowing plaintiff's medical witnesses to testify on the nursing standard of care at issue in this case for the reasons set forth below.

Plaintiff established the elements of his foundation for expert testimony when his first medical witness, Dr. LeBeau, testified that he was familiar with the standard of care of registered nurses in accredited hospitals in communities similar to Lumberton, where defendant is situated, during July of 1977. Dr. LeBeau gained familiarity with the duties and functions of registered nurses in day-to-day dealings with them. He taught nursing students in a clinical setting. He stated that the nurses who treated plaintiff's father while in the employ of defendant had comparable training and experience to the nurses with whom he

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regularly dealt because they had the same degree qualifications. More specifically, Dr. LeBeau testified that he was familiar with the basic duty of all nurses in accredited hospitals across the nation to take vital signs when a patient exhibits unusual or new symptoms. He related his familiarity with this particular standard of care to the particular facts of this case; namely, the failure of defendant's nurses to completely monitor vital signs such as blood pressure when the condition of plaintiff's father worsened.

Similarly, plaintiff's other medical witness, Dr. Rein, testified that he had taught and worked with nurses. He too stated that there was no variation in the nursing standard of care for all nurses in accredited hospitals across the country in July of 1977 with respect to the basic duties at issue in this case. Like Dr. LeBeau, he satisfied the "similar training and experience" part of G.S. 90-21.12 with testimony that the nurses he worked with had the same degree requirements and similar training to those who cared for plaintiff's father.

In the context of the basic nursing duties at issue in this case, plaintiff's medical witnesses demonstrated sufficient knowledge of the relevant standard of care to be deemed expert witnesses. The testimony of plaintiff's witnesses should not be barred merely because they are doctors while defendant's agents are nurses. Clearly, defendant's suggestion that only nurses can qualify as experts to testify as to nursing standards of care is, in our opinion, not contemplated by G.S. 90-21.12. Defendant's cross-assignments of error are without merit.

[3] Defendant also contends that plaintiff's medical witnesses were not qualified to testify because they were unfamiliar with the community standards for nursing care in Lumberton. However, Drs. LeBeau and Rein did testify that the standard of care for taking and reporting vital signs of a deteriorating patient was the same for nurses in accredited hospitals across the country. Where the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community. *Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974); *Howard v. Piver*, 53 N.C. App. 46, 279 S.E. 2d 876 (1981).

[4] Defendant finally argues that plaintiff's evidence was merely speculative on the issue of proximate cause and therefore could

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not overcome the hurdle of a motion for directed verdict. Plaintiff's experts testified that defendant's nurses were negligent in not monitoring their patient's blood pressure after 11:00 p.m. when his condition worsened, in not reporting to Dr. Lee the rise in pulse to 120, and in erroneously telling Dr. Lee that the patient had not been given Librium when in fact he had. Plaintiff's experts positively stated that these acts of negligence proximately caused the death of plaintiff's father. The double dose of Librium may have prevented him from complaining of the sudden downturn in his condition, thereby preventing him from obtaining the medical assistance necessary to save his life. Even more likely, the failure to monitor blood pressure and report the 120 pulse rate kept Dr. Lee from learning that heart failure was imminent and that the patient was about to die without new treatment. This evidence was sufficient to create an issue of proximate cause for the jury.

Reversed and remanded.

Judges WHICHARD and EAGLES concur.

CHARLOTTE CROWE FERREE v. FRANK E. FERREE

No. 8428DC21

(Filed 18 December 1984)

1. Divorce and Alimony § 21.6— enforcement of separation agreement by contempt

In a judgment entered prior to the decision in *Walters v. Walters*, 307 N.C. 381, the court should not have ruled that it could not use its contempt power to enforce a Deed of Separation on the grounds that the Deed of Separation had been merely approved by the trial court. Since defendant did not file an answer or appear at the granting of the divorce, the inclusion of the Deed of Separation in the judgment was an issue to be determined by the court, and the language of the court's order made it clear that the Deed of Separation was part of the order and could be enforced by the contempt power of the court.

2. Divorce and Alimony § 21.6— separation agreement adopted by court—enforceable by contempt

The court erred in finding that there was an adequate remedy at law for the specific performance of a separation agreement and that defendant was en-

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titled to a jury trial on the issue of mutual mistake of fact because the trial court had adopted the agreement in its judgment for divorce. The contractual character of the agreement was subsumed into the judgment, which was *res judicata* to the issues decided therein.

APPEAL by plaintiff from *Roda, Judge*. Judgment entered 11 April 1983 in District Court, BUNCOMBE County. Heard in the Court of Appeals 23 October 1984.

This is a civil action in which plaintiff, Charlotte Crowe Ferree, seeks to enforce by the contempt power of the court a "Deed of Separation" that was allegedly made a part of a judgment for absolute divorce.

Plaintiff and defendant, Frank E. Ferree, plaintiff's former husband, entered into a "Deed of Separation" on 29 May 1979. By the terms of the Deed of Separation, it is a separation agreement under which defendant would make payments on an indebtedness secured by the home and lands of the parties. The agreement further provided that upon payment of the outstanding indebtedness, the parties would sell the property and divide the proceeds.

The terms of the separation agreement also provide that "this agreement and settlement shall be incorporated in the final decree and become a part thereof."

Plaintiff filed for divorce on 3 November 1980. In her complaint, plaintiff prayed that the "Deed of Separation of 29 May 1979" be "made a part of the divorce judgment, incorporated therein and become a part thereof." Defendant made no answer to plaintiff's complaint and did not appear in court at the granting of the divorce.

On 18 February 1980, the Honorable Earl J. Fowler, Jr., Judge, entered an order granting plaintiff's request for absolute divorce. The order contained findings of fact and conclusions of law and ordered that "the Deed of Separation dated 29 May 1979, and entered into by plaintiff and defendant, is incorporated herein by reference, attached hereto and made a part of this Judgment as if more fully set forth herein."

Defendant later defaulted in the payments required by the agreement and refused to sell the property.

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Plaintiff obtained a citation for contempt on 14 January 1983. Defendant made the payments required by the agreement prior to the hearing on the contempt citation but still refused to sell the joint property.

At the hearing, defendant alleged:

1. That he was entitled to a jury trial on the issue of whether or not the separation agreement was entered into as a result of mutual mistake of fact as to ownership of the property;

2. That an adequate remedy at law and equity existed for a specific performance of the separation agreement and therefore such an action should be pursued rather than in this cause; and

3. That contempt was not an appropriate remedy because the Court had only approved the Separation Agreement, not made it a part of the judgment.

On 11 April 1983, the trial court declined to find defendant in contempt, saying that the divorce judgment did not adopt the separation agreement but merely approved the agreement. The trial court also entered judgment in favor of defendant's remaining tendered issues as well. Plaintiff appeals.

Riddle, Shackelford & Hyler, by John E. Shackelford, for plaintiff-appellant.

James H. Toms, for defendant-appellee.

EAGLES, Judge.

I

Plaintiff first assigns as error that the trial court erred when it refused to enforce the Deed of Separation under its contempt power. We agree that there is error.

It is now the law in this state that all separation agreements approved by the court as judgments of the court will be treated as court ordered judgments. These court ordered separation agreements are modifiable and enforceable by the contempt powers of the court in the same manner as any other judgment in a domestic relations case. *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983). However, judgment here was entered prior to the Supreme Court's determination of *Walters*, and the rule in *Walters* is prospective only. *Id.* at 386, 298 S.E. 2d at 342.

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For this reason, defendant argues that prior to *Walters* our appellate courts had consistently held that separation agreements entered into by the parties prior to a divorce judgment that were merely "approved" by the court, could not be enforced by the court's contempt power. See, *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946); *Brown v. Brown*, 224 N.C. 556, 31 S.E. 2d 529 (1944); and *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). These decisions held that consent judgments involving separation agreements were of two kinds. In one, the court merely approves or sanctions the terms of a separation agreement and in the other, the court adopts the agreement of the parties as its own determination of the respective rights and obligations of the parties and orders the terms of the separation agreement be performed. A contract approval of the first type is enforceable only as an ordinary contract and not by contempt. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). These cases appear to apply only to consent judgments.

[1] We note that the divorce judgment in the instant case is not a consent judgment. While it is true that the parties agreed in the Deed of Separation that it would be a part of the judgment and plaintiff sought in her complaint for divorce to make it a part of the judgment, defendant filed no answer and did not appear at the granting of the divorce. Therefore, the determination of whether the Deed of Separation would be included in the judgment was an issue to be decided by the court. The trial court incorporated the Deed of Separation and ordered that "it be made a part of the judgment as if fully set forth herein." A judgment of this type is controlled by *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978) (criticized on other grounds in *Walters* supra). The *Levitch* case involved payment of alimony but is pertinent here in light of the Supreme Court's reasoning:

In the instant case, the Court expressly stated that it ORDERED, ADJUDGED and DECREED that the Separation Agreement heretofore entered into by the parties . . . be . . . incorporated by reference in this Judgment. Defendant contends that since the court failed to expressly state that the alimony provided for in the agreement was ordered to be paid, this was a mere approval of the agreement, rather than an adoption of it into the judgment. The incorporation

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language here, however, appears sufficiently compelling to indicate an intent on the part of the court to order payment of the alimony. Indeed, in the usual case in which we have found approval rather than adoption, the Court has stated merely that the agreement was approved, reviewed the subject matter of the agreement in narrative form without further order, or expressly excluded the agreement from any prejudice under the terms of the judgment. [Citations omitted.]

Id. at 439, 241 S.E. 2d at 507.

Prior to *Walters v. Walters*, supra, it might have been argued that mere incorporation by reference is insufficient to indicate adoption of the agreement, *Williford v. Williford*, 10 N.C. App. 451, 179 S.E. 2d 114, cert. denied 278 N.C. 301, 180 S.E. 2d 177 (1971). However, this court noted from a related case that the trial court in *Williford* incorporated the separation agreement into the judgment pursuant to a provision in a paragraph of the separation agreement. *Williford v. Williford*, 10 N.C. App. 529, 530, 179 S.E. 2d 113, 116, cert. denied 278 N.C. 301, 180 S.E. 2d 178 (1971). That is not the situation presented here.

In the present case the trial court specifically ordered that the Deed of Separation be incorporated by reference with no mention of any reason for the incorporation other than the facts that plaintiff in her complaint sought incorporation of the agreement and that defendant made no answer. The language of the order is clear that the Deed of Separation is part of the order and could be enforced by the contempt power of the court.

When defendant willfully refused to obey the judgment of divorce which ordered him to sell the property described in the Deed of Separation, he properly could have been held in civil contempt pursuant to G.S. 5A-21. The purpose of the contempt power is not to punish; rather, its purpose is to use the court's power to compel defendant to comply with an order of the court. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980).

Since the Deed of Separation here was made a part of the judgment for divorce and was not merely approved by the judgment, the trial court was in error when it determined that it could not use its contempt power to enforce the terms of the Deed of Separation.

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II

[2] Plaintiff also assigns as error the trial court's determination that an adequate remedy at law and equity existed for specific performance of the separation agreement and that defendant was entitled to a jury trial on the issue of mutual mistake of fact with reference to the real property in the separation agreement. We agree that there was error.

Once a court adopts the agreement of the parties and sets it forth as a judgment of the court with appropriate ordering language and the signature of the Court, the contractual character of the agreement is subsumed into the court ordered judgment. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E. 2d 345 (1983); *McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948). At that point the court and the parties are no longer dealing with a mere contract between the parties. "Should it be the sole intention of the parties to contract between themselves and to rely solely on contract law for their rights and remedies under the agreement, they must make that decision *prior* to invoking the court's power to adjudicate their rights and order performance." 307 N.C. at 407-8 n. 1 (1983). [Emphasis added.]

As applied to the instant case, the parties did enter into an agreement that could have been enforced under contract law subject to all available defenses including mutual mistake of fact, if appropriate. However, plaintiff sought to have this agreement made part of a judgment for divorce. Defendant could have responded, but apparently chose not to. Judge Fowler, acting on plaintiff's request alone, made the agreement part of the judgment for divorce. As such, it is *res judicata* to the issues decided therein.

For these reasons, we reverse the judgment of the trial court and remand for a determination of whether defendant is in contempt for willfully refusing to sell the real property and divide the proceeds of the sale with plaintiff as ordered by the District Court of Buncombe County in its judgment of divorce filed 18 February 1980.

Reversed and remanded.

Judges VAUGHN and BRASWELL concur.

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CARY WHITE GRAHAM, CHARLES M. GRAHAM, JR., BONNIE LILLIAN HEWETT WHITE AND ETHEL W. WHITE v. DONALD R. MORRISON

No. 8327SC1317

(Filed 18 December 1984)

**Cancellation and Rescission of Instruments § 10.3; Vendor and Purchaser § 5.1—
contract for sale of land—mutual mistake—jury question**

In an action for the specific performance of a contract for the sale of land, the evidence presented a jury question as to mutual mistake of fact where the contract provided that closing was contingent upon defendant buyer "having access to Rhyne Road over present right of way granted by" an adjacent landowner, a county subdivision ordinance prohibited subdivision of the property unless each subdivided lot had frontage on a public street, the easement across the adjacent landowner's property was a private easement not open to the general public, and the evidence was conflicting as to what defendant intended to do with the land, what uses the parties believed and represented could be made of the land, what sort of easement the parties believed had been granted by the adjacent landowner, and the extent the purchase hinged on beliefs by the parties about what uses could be made of the land.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 3 August 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 27 September 1984.

This is a case for specific performance of a contract for the sale of land. On 4 May 1981, the defendant, Donald R. Morrison, signed a "binder," under which he agreed to purchase two tracts of land in Mecklenburg County from the plaintiffs: a tract of 26.295 acres and a sixty foot strip of 1.17 acres between the larger tract and North Carolina Highway 27. See Illustration 1. He paid the plaintiffs \$500 on signing the binder, and promised to pay \$4,000 per acre for the land, 25% of that due on the date of closing, and the rest payable in 120 monthly installments, bearing interest at 12% per annum simple interest. The binder and the closing of the sale were "contingent on Buyer having access to Rhyne Road over present right of way granted by Livingston Coatings Co. on August 24th, 1976." The "present right of way" apparently was a 30 foot wide easement for ingress and egress granted by Livingston Coatings Company across its property. See Illustration 1.

The defendant testified that before signing the binder, he told Mr. Black, the plaintiffs' real estate agent, that he desired to

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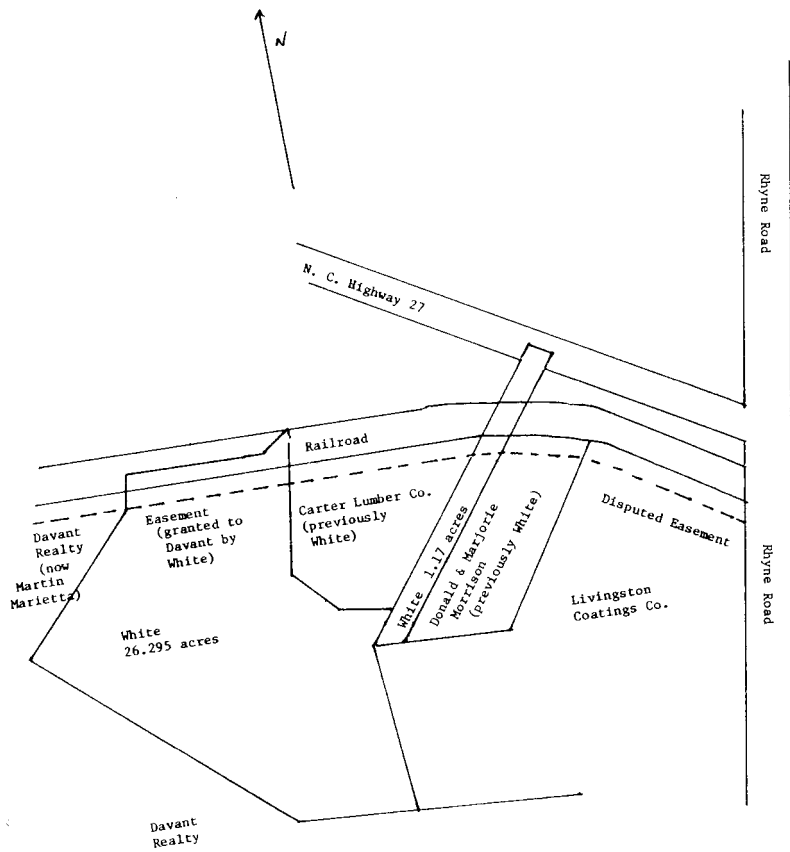


Illustration 1

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subdivide the 26 acres, build warehouses on the individual tracts, and then lease or sell the warehouses. He testified further that Mr. Black assured him that this could be done. Defendant knew that the 26 acres had no frontage on public roads, and that easement problems might interfere with development of the property. Mr. Black, he testified, assured him there were no problems with the easement in the event the land was subdivided and warehouses were built on it.

Defendant asked Mr. Black to write a condition into the binder concerning access over the easement across the Livingston property. The contingency clause described above was apparently drafted in response to this request.

A subdivision ordinance of Mecklenburg County prevented subdivision unless each lot had frontage on a public street.

The defendant had previously purchased from plaintiffs a tract of land of approximately five acres, in between land owned by the Carter Lumber Company and Livingston Coating Company. See Illustration 1. This tract adjoined the sixty foot strip which defendant agreed to purchase in the binder of May, 1981. With ownership of the sixty foot strip, defendant would own a narrow corridor between his five acre tract and the 26 acre tract.

After trial before a jury, the trial judge granted plaintiffs' motion for summary judgment. Defendant appeals the judgment.

Childers, Fowler and Childers, by Max L. Childers and David C. Childers, for plaintiff appellee.

Tucker, Hicks, Sentelle, Moon and Hodge, by John E. Hodge, Jr. and Charles H. Cranford, for defendant appellant.

ARNOLD, Judge.

Defendant appeals from the trial judge's grant of plaintiffs' motion for summary judgment, ordering him to proceed with the purchase of two tracts of land from plaintiffs. Plaintiffs' motion came at the end of all the evidence, and would have been more appropriately framed as a motion for directed verdict. Because the two motions are functionally similar, see *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 404, 250 S.E. 2d 255, 258 (1979); *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E. 2d 214, 217 (1975),

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we will treat defendant's appeal as from a directed verdict. The standard on review is similar to that employed on review of summary judgment. It is whether defendant presented sufficient evidence to take the case to the jury, or, whether the evidence, taken in the light most favorable to the defendant, raised an issue of material fact, which only a jury is capable to decide. *See Cutts v. Casey*, 278 N.C. 390, 418, 180 S.E. 2d 297, 312 (1971); *Paccar Financial Corp. v. Harnett Transfer, Inc.*, 51 N.C. App. 1, 5, 275 S.E. 2d 243, 246 (1981). Our review of the record in this case, of the testimony of the parties and the history of ownership of land and interests in land in the vicinity of the tracts in dispute, persuades us that there were genuine issues of material fact and that the grant of summary judgment, which we treat as a directed verdict, was improper.

The defendant testified that he desired to purchase the property at issue in this case in order to build warehouses on it, subdivide the land, and then sell or lease the warehouses. He testified also that the plaintiffs' real estate agent represented to him that this would be possible, and that there would be no problems with easements. Plaintiff said that he requested plaintiffs' real estate agent to draft a provision in the binder, making the sale contingent on his having access to Rhyne Road over the present right of way across the Livingston Coating Company's property. The "present right of way" was an easement of ingress and egress apparently granted by the Livingston Company in 1976 to the plaintiffs and to the Davant Realty Company, which owned adjacent property.

Under the subdivision ordinance in effect in Mecklenburg County at the time of the negotiations and attempted transaction, the defendant could not have subdivided the property in dispute unless each subdivided lot had frontage on a public road. Defendant discovered at some point, apparently after he signed the binder, that the easement across the Livingston Company's property was a private easement, not open to the general public. When he discovered this, he decided not to go through with the closing. Defendant's testimony indicates that Mr. Black, the plaintiffs' real estate agent, came back to defendant's office after the binder was signed, and attempted to work out the easement problems. Mr. Black has testified in an affidavit that he made no representation to defendant about possible uses of the land.

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Our review of the record indicates that there is a conflict in the evidence on the related factual issues of what defendant intended to do with the land, what uses the parties believed and represented could be made of the land, and what sort of easement the parties believed had been granted by the Livingston Coating Company. There is further dispute over the extent the sales agreement hinged on the parties' beliefs about what uses could be made of the land. Conflict in the evidence regarding these factual issues means there is conflict on the question of whether the parties operated under a mutual mistake of fact in entering into the contract for sale of land. See generally *Gardner Homes Inc. v. W. G. Gaither*, 31 N.C. App. 118, 228 S.E. 2d 525 (1976); *McKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967). Given this evidentiary conflict on the elements of mutual mistake the trial judge's refusal to allow the case to go to the jury was improper.

We note that had defendant gone through with the purchase he would have received a sixty foot strip of land connecting the main tract of twenty-six acres with North Carolina Highway 27. It was then possible that he might have had another outlet to a public road, although this may have been restricted by the railroad and the thirty foot private easement, which crossed the strip before it reached the highway. What matters, though, is that defendant's primary concern in entering the contract for sale of land, as evidenced by his insistence on the contingency clause, was the easement across the Livingston Company's land to Rhyne Road. The fact that there might have been another right of way may go to the questions of whether defendant had reason to be concerned about access, and accordingly of whether his testimony about his objectives and Mr. Black's representations to him is credible, but it does not compel us to rule as a matter of law that there was no mutual mistake as to the potential uses of the easement.

We observe finally that our doubts about the propriety of the directed verdict are heightened by the lack of any document in the record specifically describing the conditions of the Livingston Company's easement. The grant of easement dated 24 August 1976 (Defendant's Exhibit 2), is a grant from the plaintiffs to the Davant Realty Company of a right of way across plaintiffs' land, most of which is the subject of this suit. The grant mentions the Livingston easement "of ingress and egress," which ensures ac-

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cess to Rhyne Road for both the plaintiffs and the Davant Company (now Martin Marietta), but we have no document before us specifically granting or describing that easement. Indeed, the map offered as "Court's Exhibit One" does not even depict the easement across the Livingston property to Rhyne Road. Our understanding is that this case centers on that easement. In light of the inconclusiveness of the documentary evidence as to the nature of the easement we are skeptical that the trial judge could properly have determined that as a matter of law that the evidence so favored the plaintiffs that there was no jury question.

We see no need to reach the other issues raised by the defendant.

Reversed and remanded.

Judges WELLS and HILL concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER GLENN FORD

No. 8413SC269

(Filed 18 December 1984)

1. Criminal Law § 146.5; Constitutional Law § 79— minimum mandatory sentence—guilty plea—contention of cruel and unusual punishment not allowed

A defendant in a prosecution for trafficking in marijuana could not contend that the minimum mandatory sentence was significantly disproportionate to the crime and therefore cruel and unusual punishment because he entered a plea of guilty. Even so, his argument was without merit. G.S. 90-95(h)(1)d, G.S. 15A-1444, U.S. Constitution, Amendments VIII and XIV, Art. I, § 27, N.C. Constitution.

2. Searches and Seizures §§ 15, 23— search warrant—no possessory interest in property searched—no standing—evidence sufficient for probable cause

A defendant in a prosecution for trafficking in marijuana did not have standing to challenge the sufficiency of a warrant to search a mobile home when he was not legitimately on the premises at the time of the search and did not assert a property or possessory interest in the premises searched. Moreover, evidence of unusual traffic and an odor of marijuana constituted probable cause to believe marijuana might be found in the home. G.S. 15A-972.

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3. Searches and Seizures § 3— odor of marijuana detected from nearby woods— no expectation of privacy

In a prosecution for trafficking in marijuana, evidence that an officer detected the odor of marijuana coming from a mobile home was not tainted by the fact that the officer was in the woods near the home when he detected the odor. Defendant did not have a reasonable and constitutionally recognized privacy expectation in nearby woods, irrespective of whether the officer's presence constituted a technical trespass, and defendant has not contended that the curtilage area was violated.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 15 August 1983 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 5 December 1984.

Defendant was convicted of trafficking in marijuana in violation of G.S. 90-95(h)(1)d. Pursuant to a plea bargain arrangement, defendant was sentenced to 35 years imprisonment and fined \$200,000.

On 16 May 1983, State Bureau of Investigation Special Agent Fred L. McKinney requested a search warrant based upon the following information which he believed to be indicative of smuggling activity. Law enforcement officers had been notified of the suspicious activities of several unidentified persons. Several months earlier, a house had been rented to an R. W. Johnson under suspicious circumstances. Johnson's listed place of business was fictitious. Neighbors reported unusual activity at the house late at night. When the lessor found grounds to break the lease, he found little evidence of actual occupancy upon entry. On 13 May a second house at Isle Plaza, Ocean Isle Beach, was rented by the same party. On 14 May continuous surveillance was established by several law enforcement officers. These officers recorded the comings and goings of several cars, pickup trucks and flat bottom boats. One of these vehicles was followed to a nearby mobile home which had been recently and improperly installed in a secluded location. On the night of 15 May 1983, S.B.I. Agent R. D. Shipp and Customs Patrol Officer H. Dupray entered the woods near the mobile home and observed the rear door and windows open. They also detected a very strong odor of marijuana emanating from the mobile home and thereby concluded that the mobile home was being used as a storage facility for the suspected smuggling operation. At 2:00 a.m. on 16 May 1984, a search warrant was issued on the grounds that the foregoing in-

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formation constituted sufficient probable cause to search the mobile home in question.

A search pursuant to the warrant confirmed the officers' suspicions. The mobile home was found to contain several hundred bales of marijuana weighing a total of 14,380 pounds. The mobile home was unoccupied at the time of the search but several personal articles were also found within. Of these, an empty beer bottle, a flute and several papers were found to be covered with at least 24 fingerprints which matched those of defendant. The listed owner of the mobile home, Richard Williams, was never located and is believed to be fictitious.

Defendant was shortly thereafter arrested at the Isle Plaza residence, found to have a key to the mobile home in his possession, and charged with two violations of the North Carolina Controlled Substances Act. On 15 August 1983, defendant's motion to suppress evidence obtained under this and two subsequently issued search warrants was denied. Pursuant to the plea bargain, defendant pled guilty to one count of possessing more than 10,000 pounds of marijuana in violation of G.S. 90-95(h)(1)d. Defendant was sentenced to a 35-year term of imprisonment and fined \$200,000 under the agreement. He appeals pursuant to G.S. 15A-979(b).

Attorney General Edmisten, by T. Buie Costen, Special Deputy Attorney General, for the State.

Hafer, Hall & Schiller, by Marvin Schiller, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends that the minimum mandatory sentence and fine imposed under G.S. 90-95(h)(1)d is significantly disproportionate to the crime and therefore constitutes cruel and unusual punishment prohibited by the 8th and 14th Amendments to the United States Constitution and article 1, section 27 of the North Carolina Constitution. Defendant, however, entered a plea of guilty and is thereby precluded from making an appeal on this ground. G.S. 15A-1444. Moreover, even if we were to grant discretionary review we would find defendant's argument to be without merit.

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[2] The remaining issue presented on appeal is whether the trial court erred in denying defendant's motion to suppress the evidence acquired pursuant to the search of the mobile home. It is defendant's position that the supporting affidavit presented to the magistrate by Special Agent McKinney failed to show sufficient probable cause to justify the issuance of a search warrant. *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). Defendant alternatively argues that crucial information contained within the affidavit was in itself the product of an illegal warrantless search and thereby renders inadmissible the evidence ultimately seized. *State v. Spencer*, 281 N.C. 121, 127, 187 S.E. 2d 779, 783 (1972). We disagree with both contentions and hold that defendant's motion to suppress was properly denied.

At the outset, we find that defendant did not have standing to challenge the sufficiency of the warrant. "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed. 2d 176 (1969). Only an "aggrieved" party may move to suppress evidence under G.S. 15A-972 by demonstrating that his personal rights and not those of some third party have been violated. *Accord State v. Greenwood*, 301 N.C. 705, 708, 273 S.E. 2d 438, 440 (1981); *see also State v. Taylor*, 298 N.C. 405, 415, 259 S.E. 2d 502, 508 (1979) (comparing G.S. 15A-972 and Rule 41(e) of the Federal Rules of Criminal Procedure). In other words, only those persons who hold a reasonable expectation of privacy in the premises searched may invoke the protections of the 4th Amendment, *State v. Jones*, 299 N.C. 298, 306, 261 S.E. 2d 860, 865 (1980), and it is the defendant who bears the burden of establishing that he is such an aggrieved party. *State v. Taylor*, 298 N.C. at 415-16, 259 S.E. 2d at 508. In the present case, defendant has failed to meet his burden of proof. Defendant was not legitimately on the premises at the time of the search. *See Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978), *reh. denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed. 2d 83 (1979); *Jones v. United States*, 362 U.S. 257, 267, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960). Nor did defendant assert either a property or possessory interest in the premises searched. The evidence reveals only an earlier presence and accessibility and neither is sufficient to establish the requisite "privacy interest" in the absence of additional information. *State v. Taylor*, 298 N.C. at 416,

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259 S.E. 2d at 508-09 (1979). Defendant therefore has no standing to challenge the legality of the search.

Irrespective of defendant's standing to challenge the warrant, we nevertheless find that the warrant was properly issued. "Probable cause, as used in the Fourth Amendment . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128-29, 191 S.E. 2d 752, 755 (1972); *State v. Harris*, 43 N.C. App. 184, 185, 258 S.E. 2d 415, 416 (1979). Unusual traffic at a residence may not, in itself, constitute probable cause to justify the issuance of a warrant authorizing a search of that residence for drugs. *State v. Crisp*, 19 N.C. App. 456, 199 S.E. 2d 155 (1973). However, evidence of such activity, in conjunction with the discovery of marijuana odor coming from within *does* constitute sufficient probable cause to authorize a search of the implicated residence. *State v. Trapper*, 48 N.C. App. 481, 269 S.E. 2d 680, *appeal dismissed*, 301 N.C. 405, 273 S.E. 2d 450 (1980), *cert. denied*, 451 U.S. 997, 101 S.Ct. 2338, 68 L.Ed. 2d 856 (1981). In the present case, the detection of marijuana odors by a surveillance officer did constitute adequate evidence from which a magistrate could conclude that there was probable cause to believe that marijuana might be found by a search of the mobile home.

[3] This evidence was not tainted by the fact that Customs Patrol Officer Dupray was located in woods near the mobile home at the time he detected the odor. Defendant did not have a reasonable and constitutionally recognized privacy expectation in nearby woods, irrespective of whether or not the officers' presence constituted a technical trespass at common law. The special protections of the Fourth Amendment to people in their "'persons, houses, papers and effects' does not extend to open fields." *Oliver v. United States*, --- U.S. ---, 104 S.Ct. 1735, 80 L.Ed. 2d 214, 222 (1984); *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). The officers were legitimately present in the woods beyond the cleared area immediately surrounding the mobile home and defendant has not contended that they violated the curtilage area. See *Oliver v. United States*, *supra*. "The term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as

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those terms are used in common speech . . . [and] a thickly wooded area . . . may be an open field as that term is used in construing the Fourth Amendment." *Id.*, 80 L.Ed. 2d at 225 n11 (citing *United States v. Pruitt*, 464 F. 2d 494) (9th cir. 1972). The officers' detection of marijuana odor while located in these woods was therefore properly considered by the magistrate in determining the existence of probable cause and the fruits of the search were properly admitted as evidence.

Affirmed.

Judges WEBB and HILL concur.

FAYE L. MASSEY v. CHARLES A. MASSEY

No. 848DC18

(Filed 18 December 1984)

Divorce and Alimony § 24.8— child support—changed circumstances—insufficient evidence and findings

The trial court's conclusion that a substantial change of circumstances justified a decrease in the father's child support obligation was not supported by the evidence and findings where the court's findings related entirely to the relative average adjusted gross income of the father and the mother, the court made no specific findings as to any other factors, such as expenses, estates and accustomed standard of living of the child and the parents, and the relative income data was inconclusive.

APPEALS by plaintiff and defendant from *Goodman, Judge*. Order entered 14 September 1983 in District Court, WAYNE County. Heard in the Court of Appeals 16 October 1984.

The parties entered into a Separation Agreement on 22 January 1979 in which the defendant, Charles A. Massey, agreed to pay the plaintiff, Faye L. Massey, \$60 per month for the support of each of their two children during the period the children reside with Mrs. Massey. The Agreement did not provide a specific termination date for the support payments.

The plaintiff filed suit to set aside the Separation Agreement. This suit resulted in a Consent Judgment, entered 19

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August 1980, which modified the child support payments so that the defendant agreed to pay the plaintiff \$250 per month for both children from 15 August to 15 May each year, and \$100 per month for the remaining months of the year. On 18 May 1982 an Order was entered, finding defendant in wilful contempt of court for failure to pay to plaintiff as child support the amount agreed to in the 1980 Consent Judgment, \$1,750.

On 3 July 1982, one of the parties' two minor children reached the age of eighteen. Defendant thereafter reduced his child support payments for the period September 1982 to May 1983 from \$250 per month to \$125 per month. For the months August 1982 through July 1983 an arrearage of payments of \$1,925 developed. Plaintiff filed a Motion that defendant show cause why he should not be held in contempt for failure to make the total child support payments. In a Counter-Motion the defendant asked for a reduction in the amount of child support.

On 14 September 1983 an Order was entered, finding that defendant was not in wilful contempt for failure to pay the arrearage, but ordering him nonetheless to pay the arrearage (\$1,925) to plaintiff before 31 August 1983. Further, the court found that defendant had shown a substantial change of circumstances, justifying a reduction in child support from \$250 per month to \$140 per month for the one minor child remaining at home with plaintiff.

Plaintiff appeals the reduction in child support. Defendant appeals the order that he pay the arrearages.

Baddour, Lancaster, Parker & Hine, by H. Martin Lancaster, for plaintiff.

Kornegay & Head, by Janice S. Head and George R. Kornegay, Jr., for defendant.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in reducing the child support payments payable by defendant from \$250 per month to \$140 per month. She argues that the findings made by the trial judge do not support his conclusions of law: that a change of circumstances necessitated a reduction in the size of payments made by the defendant.

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In modifying child support payments, the trial court must make factual findings specific enough for us to ascertain whether he took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the children and the parents. *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980), *citing Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); G.S. 50-13.4(c). In the absence of such findings, we are unable to determine whether the order is adequately supported by competent evidence.

We begin by describing the agreement, orders and judgments, in the case at bar, which have dealt with the matter of child support. In January 1979 the parties entered into a Separation Agreement. The Agreement provided that defendant should pay \$60 per month for the support of each of the parties' two children. The Agreement stated that this support should be paid only so long as the children resided with the plaintiff. No termination date for child support was mentioned in the Agreement. The Agreement also contained a provision that the defendant would pay for the education of the children beyond high school "consistent with the Husband's [defendant's] income and financial obligations at the time."

In the Consent Judgment of August 1980, the child support payments were modified, although the rest of the Separation Agreement was incorporated into the Judgment as written. The Consent Judgment provided that the defendant would pay \$250 per month in child support for the school term, defined as the period 15 August-15 June, and \$100 per month for the remaining months. The Judgment did not specify what part of the payments would go to each of the two children.

In an Order of 18 May 1982, the court declared that the defendant was in wilful contempt for failure to pay an arrearage of \$1,750. It also attempted to clarify how the parties should manage the payment of college expenses for the older of the two children. The Order did not consider whether child support payments should end for this child, who was about to turn eighteen.

The Order of 14 September 1983, at issue in this case, found that the younger child's reasonable expenses were \$420 per month, and that the defendant's reasonable share of that was

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\$140. The court thus reduced the defendant's obligation from \$250 per month to \$140 per month. The court based this reduction on a "substantial change of circumstances." Its finding of "changed circumstances" related entirely to the relative average adjusted gross incomes of plaintiff and defendant. The court made no specific findings as to any other factors, such as expenses, estates and accustomed standard of living of the child and parents.

In the September 1983 Order, the trial court found:

A showing of substantial change of circumstances has been made herein in that the evidence shows an increase in the income of Plaintiff since 1980 and the Plaintiff's adjusted gross income for 1982 was twice that of the Defendant; further, the Plaintiff's income for an average three (3) year period, (1980, 1981 and 1982) was two times the income of Defendant for the same three (3) year period.

Yet, a close look at the parties' relative adjusted gross incomes causes us to doubt that a "substantial change of circumstances" actually did occur. The evidence shows that the defendant's adjusted gross income was: \$9,010 in 1979, \$5,215 in 1980, \$5,883 in 1981, and \$9,116 in 1982. The plaintiff's adjusted gross income was: \$14,961 in 1979, \$14,559 in 1980, \$8,514 in 1981, and \$18,371 in 1982.

In 1980, the year of the Consent Judgment, the defendant's income was dropping (from \$9,010 to \$5,215) and the plaintiff's income also had dropped (from \$14,961 to \$14,559). In 1979 the plaintiff made somewhat less than twice what defendant did; in 1980 plaintiff made somewhat more than twice what defendant did. By August 1980, the trial judge must have been aware that defendant's income was decreasing, yet it found the defendant able to pay \$250 per month during the school year. Indeed, in May 1982 the court entered an order, finding defendant in wilful contempt for failure to pay child support agreed to in the 1980 Consent Judgment; the court found no change in circumstances then.

In 1982, the plaintiff's income increased to approximately \$18,000. The defendant's income also increased to slightly higher than its 1979 level of \$9,010. In 1982 the plaintiff made almost exactly twice what defendant did. In 1980, when the Consent Judgment was entered, the plaintiff made substantially more than

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twice what the defendant made. Thus, a comparison of the parties' adjusted gross incomes since 1980 does not clearly support the conclusion that plaintiff's ability to pay child support in 1983, as opposed to defendant's, was substantially better than their relative abilities in 1980.

Indeed, the picture of the parties' relative abilities to pay child support, if based only on relative incomes, is simply incomplete. At no point did the trial judge make other findings as to the parties' estates, expenses and legal obligations. We note, for example, that the defendant had a substantial savings account, of \$35,000, in 1982. Considering the lack of findings as to other factors, and the inconclusiveness of the income data, we cannot say that the trial court's finding of a substantial change of circumstances was supported by competent evidence.

We make one final observation: the Order of September 1983 is unclear as to whether the trial court was reducing (from \$250) or increasing (from \$125, one-half of the \$250 payment) the child support payment of the younger child. The court made a finding of the current needs of the child, but gave no indication as to whether the circumstances of the child had changed since 1980. We have no way to tell whether the court took account of the "accustomed standard of living" of that child.

On the question of the payment of arrearage, we find that the defendant had no right to withhold payments contrary to the court order. The defendant could easily have taken the question of payments due after his child reached majority to the court for a modification of the order. The defendant had an obligation to observe the order until it was lawfully changed.

The Order of 14 September 1983 is affirmed as to the requirement that defendant pay the arrearages of \$1,925, and reversed and remanded as to the finding that defendant has shown a substantial change of circumstances and that the child support payments should be reduced.

Affirmed in part. Reversed and remanded in part.

Judges WELLS and HILL concur.

Kabatnik v. Westminster Co.

JAROSLAV J. KABATNIK v. WESTMINSTER COMPANY

No. 8418SC423

(Filed 18 December 1984)

1. Architects § 2— action to recover architect's fees—evidence sufficient for jury

In an action to recover architect's fees withheld under a contract clause requiring reimbursement of advances paid by the original developer, defendant's motion for a directed verdict was properly denied where the evidence taken in the light most favorable to plaintiff showed that plaintiff furnished all architectural services required under the present contract, the present contract made no reference to withholding by defendant, and the payment interpreted by defendant as an advance from the original developer was asserted by that developer in a prior action to be an accord and satisfaction for services rendered.

2. Evidence § 23— amended pleading—prior action—admissible

In an action to recover architect's fees withheld under a contract clause requiring reimbursement of advances paid by the original developer, the court did not err in admitting a pleading from a prior action between the architect and the original developer which was later amended and which was contradictory to the testimony of the original developer in the current action. Amended, withdrawn, or abandoned pleadings are admissible in the absence of evidence that the pleading was unauthorized, or an affirmative showing that the party was without knowledge of the real facts when such pleading was prepared.

3. Architects § 2— instructions on rights of earlier developer—proper

In an action to recover architect's fees withheld under a contract clause requiring reimbursement of advances paid by an earlier developer, the court correctly instructed the jury on the rights of defendant in regard to the earlier developer's testimony.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 6 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 December 1984.

This appeal involves a civil action wherein plaintiff architect seeks to recover from defendant real estate developer certain fees due under a contract between plaintiff and defendant for architectural services.

Plaintiff and defendant entered into an agreement in June of 1976 whereby plaintiff was to provide architectural services to defendant in connection with the development of a 100 unit residential project. Plaintiff's total fee for the project amounted to \$60,307 at the project's completion, and defendant has paid plain-

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tiff all but \$7,700 of the amount owing under the contract. Defendant has withheld \$7,700 in order to reimburse Dr. George Simkins, the original developer of the project, in reliance on a clause in the contract with plaintiff that reads as follows:

18. From Design, Engineering, and Supervisory fees earned and received, Architect agrees to reimburse Dr. George Simkins for architectural advances.

In a prior action between Dr. Simkins and plaintiff (*Simkins v. Kabatnik*), Simkins sued Kabatnik for reimbursement of advancements made to Kabatnik on architectural fees in connection with the same project. Kabatnik counterclaimed, alleging that Simkins owed him \$14,800 on a total bill of \$22,500 for services rendered. Simkins responded, asserting as an affirmative defense payment of \$7,700 to Kabatnik as an accord and satisfaction of the counterclaim, later amended to say that the counterclaim had been satisfied by compensation paid by Westminster Company for the same services. With the filing of the complaint in this action, Simkins and Kabatnik took voluntary dismissals with prejudice with respect to their claims in the prior action pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

When this action came to trial, defendant moved for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. These motions were denied. The issue was submitted to the jury and answered as follows:

Is the plaintiff entitled to recover \$7,700 from the defendant?

Answer: Yes.

Defendant's motion for judgment notwithstanding the verdict was denied. Judgment was entered upon the verdict in favor of plaintiff for \$7,700 plus interest and costs. Defendant appealed.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for plaintiff appellee.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, for defendant appellant.

HILL, Judge.

Defendant brings forth three assignments of error concerning his motion for directed verdict under Rule 50(a) of the North

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Carolina Rules of Civil Procedure, admissibility of evidence, and instructions to the jury. We have examined each of the assignments and find no basis for reversal.

[1] The first question presented by this appeal is whether the trial court erred in denying defendant's motion for directed verdict. Defendant contends he was entitled to judgment as a matter of law by reason of plaintiff's failure to prove breach of contract.

The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In passing upon such a motion, the trial judge must consider the evidence in the light most favorable to the non-movant, resolving all conflicts and giving to him the benefit of every inference reasonably drawn in his favor. *Rappaport v. Days Inn*, *supra*; *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). A directed verdict motion by defendant may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978).

Applying this standard to the case under review, we find the trial judge properly submitted the breach of contract issue to the jury. The \$7,700 amount in controversy is derived from the \$7,700 paid by Simkins to plaintiff in satisfaction of plaintiff's counterclaim, as alleged in Simkins' initial affirmative defense in the prior action. Defendant interprets this payment as an advancement by Simkins to plaintiff for which Simkins is entitled to reimbursement under the contract between plaintiff and defendant. However, the agreement in the prior action and the present contract, while similar, are not the same. "Work under the former was completed and the prior claim mature before work under the latter had even begun. The present claim did not mature until 1979, almost four years after the first claim." *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712-13, 306 S.E. 2d 513, 516 (1983). The present contract made no reference to withholding by defendant. Plaintiff submitted evidence tending to show that he furnished all architectural services required under the present contract. It is well settled that the failure to pay the balance due on a contract for services constitutes a breach of contract. *McGuire v. Sammonds*, 247 N.C. 396, 100 S.E. 2d 829 (1957). Plain-

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tiff's evidence, taken in the light most favorable to him, would justify the jury in finding a breach of contract; consequently, the trial judge correctly submitted the issue to the jury.

[2] Defendant next contends that the trial court erred in admitting into evidence a pleading from the prior action which was later amended. In the prior action of *Simkins v. Kabatnik*, Simkins asserted an affirmative defense of payment to Kabatnik of \$7,700 as complete accord and satisfaction of Kabatnik's counterclaim. The affirmative defense, inconsistent with Simkins' testimony in the present action that the \$7,700 was an advance for which he should be reimbursed by Kabatnik, was later amended to say that the counterclaim had been satisfied by compensation paid by Westminster Company for the same services.

While defendant asserts the view that a pleading is inadmissible when superseded by an amended pleading, withdrawn, or abandoned, the general rule is to

regard them as affecting the weight, rather than the competency, of the statements, and hold that after making all due allowances there may remain a residuum of probative force in statements in abandoned or superseded pleadings, to the benefit of which the opposite party is entitled, in the absence of evidence that the pleading was unauthorized, or an affirmative showing that the party was without knowledge of the real facts when such pleading was prepared.

31A C.J.S., Evidence, § 304, p. 787. This the defendant has failed to show. In *Morris v. Bogue Corporation*, 194 N.C. 279, 139 S.E. 433 (1927), it was held that in a civil action to recover services rendered where an amendment to the complaint has been allowed and filed by the plaintiff, the allegations of the original complaint when contradictory to the plaintiff's position at trial are competent evidence when relevant. The affirmative defense, inconsistent with Simkins' testimony, was competent, and defendant's contention that its admission was prejudicial error is without merit.

[3] Defendant finally asserts that the trial court erred in its charge to the jury regarding the rights of Dr. Simkins. Simkins' testimony attempted to interpret the amount he paid to plaintiff as an advancement by Simkins to plaintiff for which Simkins is

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entitled to reimbursement under the contract between plaintiff and defendant. Regarding this matter, the trial judge instructed the jury as follows:

[I]f the plaintiff has proved to you by the greater weight of the evidence that \$7,700 paid by the doctor was in payment for work done and that it was not an advance on architectural fees, it would be your duty to answer this issue Yes in favor of the plaintiff.

If, on the other hand, the plaintiff has failed to so prove, or if you are unable to say where the truth lies, it would be your duty to answer this issue No in favor of the defendant.

We believe the trial judge's instruction sufficiently stated the rights of defendant in regard to Simkins' testimony. The instruction, read contextually as a whole, *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), is correct. Defendant has failed to demonstrate prejudicial error.

No error.

Chief Judge VAUGHN and Judge WEBB concur.

SHIRLEY GILBERT ISENHOUR, ADMINISTRATRIX OF THE ESTATE OF CONLEY BRUCE ISENHOUR; SHIRLEY GILBERT ISENHOUR, INDIVIDUALLY; AND JERRY ISENHOUR v. HILLIS W. ICENHOUR AND KENNETH H. ICENHOUR, Co-ADMINISTRATORS OF THE ESTATE OF DEWEY R. ISENHOUR

No. 8425SC208

(Filed 18 December 1984)

1. Tenants in Common § 3— cotenancy—accounting for rents

By virtue of their cotenancy with defendants' predecessor, plaintiffs are entitled to an accounting for rents received from the property by defendants' predecessor.

2. Payment § 4; Rules of Civil Procedure § 8.2— burden of pleading and proving payment

The burden is upon the party contending payment to plead and prove payment.

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3. Evidence § 11.5— cotenancy—accounting for rents—dead man's statute—affidavit by lessee

In an action against the estate of a deceased cotenant to recover one-half of the rents received from cotenant property, the lessee of the property was not "a person interested in the event" within the purview of the dead man's statute, G.S. 8-51, and the lessee's affidavit that he had paid the deceased cotenant \$1,000.00 each month in rental fees for use of the cotenancy property was admissible in a summary judgment hearing.

4. Rules of Civil Procedure § 56— summary judgment—lessee's affidavit not suspect

In an action against the estate of a deceased cotenant to recover one-half of the rents received from cotenant property, the lessee of the property did not have an interest in the litigation so as to raise an issue as to the credibility of the lessee which would preclude summary judgment based on his affidavit.

5. Rules of Civil Procedure § 8.2; Waiver § 3— waiver of rights—necessity for pleading

A defense based upon waiver of rights by the plaintiff is an affirmative defense which must be pled by defendants, and where the defense of waiver was neither pled nor raised at the hearing on a motion for summary judgment, it was not properly before the appellate court in an appeal from summary judgment.

APPEAL by defendants from *Ferrell, Judge*. Judgment entered 14 November 1983 in Superior Court, CALDWELL County. Heard in the Court of Appeals 25 October 1984.

Tate, Young, Morphis, Bogle, Boch & Farthing by E. Murray Tate, Jr., for the plaintiff appellees.

Ted G. West for the defendant appellants.

BRASWELL, Judge.

Defendants appealed from an order granting summary judgment to the plaintiffs on their complaint seeking one-half of the rents received on property owned as tenants in common by the plaintiffs' predecessor in interest, Conley Bruce Isenhour, and Dewey R. Isenhour. Defendants argue that the plaintiffs have failed to present sufficient admissible evidence to entitle them to summary judgment. We disagree and affirm the trial court's determination.

By their claim the plaintiffs seek to recover from the defendants, the co-administrators of the Estate of Dewey R. Isenhour, one-half of the rents received by Dewey R. Isenhour from Janu-

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ary 1978 until January 1982 for property owned as tenants in common by Dewey R. Isenhour and Conley Bruce Isenhour, the husband and father of the plaintiffs. The defendants answered denying the material allegations of the complaint. On 30 June 1983 plaintiffs filed a motion for summary judgment supported by joint affidavits of the plaintiffs and an affidavit of David G. Cox, the *lessee* of the property. (Emphasis added.) At the hearing on the plaintiffs' motion the defendants filed a memorandum of law objecting to the introduction of the affidavits on the grounds that they were inadmissible under G.S. 8-51, the dead man statute. At the hearing the court excluded the affidavits of the plaintiffs but considered the affidavit of Mr. Cox.

The Cox affidavit stated *inter alia* that from January 1978 until January 1982 he paid Dewey R. Isenhour the sum of \$1,000.00 each month in rental fees for use of the cotenancy property. No counteraffidavits were submitted and no oral evidence was presented. Based upon the proof submitted, the trial court entered judgment for the plaintiffs for \$13,500.00. From this judgment, the defendants appealed.

[1, 2] Defendants first contend that the plaintiffs have failed to offer any admissible evidence that Dewey R. Isenhour had failed to pay one-half of the rents received to the plaintiffs. In order to be entitled to summary judgment under G.S. 1A-1, Rule 56, a party must show that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The plaintiffs by virtue of their cotenancy with the defendants' predecessor are entitled to an accounting for the rents received from the property. See *Etheridge v. Etheridge*, 41 N.C. App. 44, 255 S.E. 2d 729 (1979). G.S. 1A-1, Rule 8(c) of the North Carolina Rules of Civil Procedure provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . payment." The burden is upon the party contending payment to plead and prove payment. *Recreatives, Inc. v. Motorcycles Co.*, 29 N.C. App. 727, 225 S.E. 2d 637 (1976). This the defendants have failed to do. There is, therefore, no genuine issue of material fact as to whether payment has been made and plaintiffs are entitled to prevail on this issue. The assignment of error is overruled.

[3] Next, defendants contend that summary judgment was improperly entered because there was no admissible evidence that

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Dewey R. Isenhour had received any payment of rent for the cotenancy property. The gravamen of the defendants' argument is that David Cox's affidavit was improperly admitted in violation of G.S. 8-51, the dead man statute. In order for evidence to be barred by the dead man statute each of the following four questions must be answered affirmatively:

(1) Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?

(2) Is the witness testifying (a) in his own behalf, or (b) in behalf of the party succeeding to his title or interest?

(3) Is the witness testifying against (a) the personal representative of a deceased person or, (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

(4) Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

Etheridge v. Etheridge, 41 N.C. App. 39, 41-42, 255 S.E. 2d 735, 737-38 (1979).

Defendants argue that David Cox, the lessee, was a person interested in the outcome of the case and was testifying in his own behalf. We disagree. "A person interested in the event of an action must have a 'direct legal or pecuniary interest' in the outcome of the litigation. (Citation omitted.)" *Id.* at 42, 255 S.E. 2d at 738. We are unable to discern any such interest on the part of David Cox because regardless of the outcome of this action, he will not be affected. Our conclusions are bolstered by this Court's holding in *Etheridge* that a grandchild who was the residual legatee of one of the estates involved in the lawsuit was not "a person interested in the event" even though the outcome of the action might tangibly affect the amount of the legacy he was to receive. The assignment of error is overruled.

[4] Next, defendants argue that there was a genuine issue of material fact because there is an issue relating to the credibility of David Cox. Citing *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392

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(1976), defendants argue that because the circumstances themselves are suspect they raise a genuine issue regarding the credibility of Mr. Cox and that this issue is sufficient to defeat the motion for summary judgment. The test set forth in *Kidd* applies only to those situations where the party with the burden of proof is seeking summary judgment based upon that party's own affidavit. The defendants' arguments are based on the premise that Cox has an interest in this litigation. Since we have already determined that this is not the case, their reliance on the doctrine set forth in *Kidd* is without merit. The assignment of error is overruled.

[5] Finally, defendants argue that summary judgment was improperly granted because the "signature of plaintiffs' predecessor in interest to the lease constitutes a waiver of the plaintiffs' right to receive rents as a matter of law or, in the alternative, raises a question of fact of the intention of plaintiffs' predecessor in interest in signing the lease." A defense based upon waiver of rights by the plaintiff is an affirmative defense which must be pled by the defendants. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E. 2d 277 (1979); G.S. 1A-1, Rule 8(c). When a defendant has failed to raise an affirmative defense in the pleadings or at trial, he cannot raise the issue on appeal. *Delp v. Delp*, 53 N.C. App. 72, 280 S.E. 2d 27, *disc. rev. denied*, 304 N.C. 194, 285 S.E. 2d 97 (1981). An examination of the record reveals that the defense of waiver was neither pled nor raised at the hearing on the motion for summary judgment. The issue is, therefore, not properly before us on appeal. The assignment of error is overruled.

The judgment of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

State v. Washington

STATE OF NORTH CAROLINA v. HAMMIE LEE WASHINGTON**No. 8426SC228****(Filed 18 December 1984)****1. Criminal Law § 91— speedy trial—State's continuances properly excluded**

There was no error in the denial of defendant's motion to dismiss for violation of the Speedy Trial Act where continuances were granted to the State because "the trial of other cases prevented the trial of this case during this session" where the State's motions were in writing, the court found that the ends of justice would be served, the court made a written finding as to the reason for its action and specified that the total period of the continuances be excluded, defendant did not object to the findings, and there is no evidence in the record that the court improperly found in any instance that the trial of other cases prevented the trial of this one. G.S. 15A-701(a1)(1), G.S. 15A-701(b)(7).

2. Robbery § 5.4— failure to instruct on common law robbery as lesser included offense of armed robbery— no error

In a prosecution for armed robbery, there was no error in the court's failure to instruct on common law robbery where defendant did not object to the omission before the jury retired and where the uncontradicted evidence showed that the robberies were committed with a dangerous weapon. N.C. Rule of App. Procedure 10(b)(2).

3. Criminal Law § 6— failure to instruct on voluntary intoxication— no error

There was no error in the court's failure to instruct on voluntary intoxication where the evidence showed that the offenses were committed at a liquor house where everyone was drinking, that defendant had bought some drinks for himself, that one of the victims had bought drinks for defendant, that defendant was by his own testimony "pretty high," and that neither defendant nor a witness on his behalf knew how many drinks he had consumed. The evidence did not support a finding that intoxication precluded defendant from having the ability to form the specific intent to commit the offenses charged.

APPEAL by defendant from Kirby, Judge. Judgment entered 2 September 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 December 1984.

Defendant appeals from a judgment of imprisonment entered upon convictions on two counts of armed robbery, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of assault with a deadly weapon.

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Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

James A. Wynn, Jr., Assistant Appellate Defender, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motion to dismiss for violation of the Speedy Trial Act, G.S. 15A-701 *et seq.* We find no error.

G.S. 15A-701(a1)(1) provides that the trial of a defendant charged with a criminal offense shall begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." The event occurring "*last in fact*" triggers the running of the 120 day period within which the defendant must be brought to trial. *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E. 2d 442, 445 (1983); *see also State v. Charles*, 53 N.C. App. 567, 569-71, 281 S.E. 2d 438, 440-41 (1981).

The relevant event which occurred last here was service upon defendant of the order for arrest on 17 February 1983. The time limitation for commencement of trial thus began to run on that date. Trial commenced on 29 August 1983, 193 days later. The State thus had "the burden of going forward with evidence" meriting exclusion of at least seventy-three days from computation of the limitation period so as to bring the commencement of trial within the requisite 120 days. G.S. 15A-703; *State v. Edwards*, 49 N.C. App. 426, 271 S.E. 2d 533 (1980).

Upon defendant's motions, the court granted two continuances for a total period of fifty-seven days. Defendant concedes that this period should be excluded. With this exclusion, trial commenced 136 days after service of the order for arrest, or sixteen days beyond the requisite 120 day period.

Upon the State's motions, the court granted three continuances for a total period of fifty-five days. In each instance it found that "[t]he trial of other cases prevented the trial of this case during this session." It further found that, considering the factors set forth in G.S. 15A-701(b)(7), "the ends of justice served by granting the continuance outweigh[ed] the best interests of the public and

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defendant in a speedy trial," and granted the continuance for that reason. It ordered the period of these continuances excluded.

G.S. 15A-701(b)(7) provides for exclusion of

[a]ny period of delay resulting from a continuance granted by any judge if the judge . . . finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record . . . the reasons for so finding.

The court must not grant the motion for continuance unless it is in writing and the court has made written findings; when the court grants a continuance pursuant to this provision, it may specify the period of time to be excluded from the period within which trial must begin. G.S. 15A-701(b)(7).

The State's continuance motions were in writing. In granting each motion the court made the requisite finding that the ends of justice would be served, made a written finding as to the reason for its action, and specified that the total period of the continuance be excluded. The requirements for exclusion of the periods resulting from the continuances granted to the State thus were fully met. G.S. 15A-701(b)(7).

Defendant argues that the record is devoid of any factual circumstances regarding the continuances granted the State, and that there is "no evidence which indicates the nature or magnitude of the 'other cases' being tried during the session" or "that any of these 'other cases' faced a speedy trial problem." Defendant did not except to the findings in the continuance orders, however, or to the orders themselves. Further, a silent record supports the presumption that the procedure in the trial court was regular and free of error. *State v. Mullis*, 233 N.C. 542, 545, 64 S.E. 2d 656, 658 (1951). Unless the contrary appears, it is presumed that judicial acts and duties have been duly and regularly performed. *State v. Johnson*, 5 N.C. App. 469, 471, 168 S.E. 2d 709, 711 (1969). Since the record here contains no evidence indicating the contrary, it is thus presumed that the court properly found in each instance that the trial of other cases prevented the trial of this one.

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We hold that the court properly excluded the periods resulting from continuances granted to defendant and to the State, and that with these exclusions defendant's trial commenced within the 120 day limitation established by G.S. 15A-701(a1)(1). This assignment of error is therefore overruled.

[2] Defendant contends the court erred in failing to instruct on common law robbery as a lesser included offense of armed robbery. He failed to object to this omission before the jury retired, however, and he thus cannot now assign it as error. N.C. R. App. P. 10(b)(2); *State v. Price*, 310 N.C. 596, 600-01, 313 S.E. 2d 556, 560 (1984). Further, the court "is not required to instruct on common law robbery when the defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use or threatened use of what appeared to be a dangerous weapon." *State v. Porter*, 303 N.C. 680, 686-87, 281 S.E. 2d 377, 382 (1981). The uncontradicted evidence showed that the robberies were committed with a dangerous weapon. The State's evidence established that defendant choked and hit the first victim with a pipe and cut her with a knife, and that he hit the second victim with a pipe. Defendant testified that he used the weapons in self-defense, but he did not deny their use. All the evidence, then, showed that the incidents involved the use of deadly weapons; an instruction on common law robbery thus was not required. These assignments of error are overruled.

[3] Defendant contends the court erred in denying his request for an instruction on his voluntary intoxication to an extent that raised reasonable doubt as to his capacity to form the specific intent required for conviction of the crimes charged. *See* N.C.P.I. —Crim. 305.10.

To make the defense of voluntary intoxication available . . . , the evidence must show that at the time of the [offenses] the defendant's mind and reason were so completely intoxicated and overthrown that he could not form a specific intent to [commit them]. [Citations omitted.] In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to [commit the offenses], the court is not required to charge the jury thereon.

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State v. Gerald, 304 N.C. 511, 521, 284 S.E. 2d 312, 318-19 (1981); see also *State v. Medley*, 295 N.C. 75, 79-80, 243 S.E. 2d 374, 377 (1978).

The evidence showed that the offenses were committed at a liquor house where everyone was drinking. Defendant had bought some drinks for himself, and one of the victims had bought some for him. Defendant testified that he was "pretty high." He did not know how many drinks he had consumed, however, and neither did a witness on his behalf.

This evidence does not support a finding that intoxication precluded defendant from having the ability to form the specific intent to commit the offenses charged. See *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312; *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374. This assignment of error is thus overruled.

No error.

Judges HEDRICK and EAGLES concur.

GOFORTH PROPERTIES, INC., AND SECURITY BUILDING COMPANY, INC. v.
TOWN OF CHAPEL HILL

No. 8415SC354

(Filed 18 December 1984)

1. Municipal Corporations § 8.1— parking ordinances—acceptance of benefit—no standing

Summary judgment was properly granted for defendant in an action to recover monies paid where plaintiffs had complied with zoning ordinances for the construction of a restaurant by choosing to pay a designated amount into the Town's off-street parking fund; the Town's parking requirement was not challenged; and the evidence showed that the restaurant had been built, that providing the designated parking spaces on site or within 500 feet was impossible or not attempted by plaintiffs, and that plaintiffs had not applied for a variance or offered to demolish their building. Because plaintiffs had received the benefit of their contribution to the fund, i.e., the right to build a structure otherwise prohibited, the Town was not required to build parking spaces commensurate with plaintiffs' contribution and plaintiffs could not challenge the validity of the ordinance.

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2. Constitutional Law § 20— church exemption from parking ordinance—no unlawful discrimination

Summary judgment was properly granted for defendant Town where defendant's planning board initially attempted to circumvent parking ordinances for a single church and the Town subsequently amended the ordinances to exempt churches from parking provisions because plaintiffs did not show actual discrimination from the planning board's action or unreasonable classification by the Town, and because the planning board acted in an advisory role rather than an administrative capacity in amending the ordinances.

APPEAL by plaintiffs from *McLelland, D. Marsh, Judge*. Judgment entered 8 November 1983 in ORANGE County Superior Court. Heard in the Court of Appeals 29 November 1984.

Plaintiff developers sought to construct a restaurant within the central business district ("the CBD") of defendant Town of Chapel Hill ("the Town"). The Town's zoning ordinances applicable to plaintiffs' project required that developments in the CBD provide off-street parking within 500 feet of the site. The ordinances established formulae for determining the number of spaces required, by which plaintiffs' project had to provide 11.29 spaces. In lieu of providing parking spaces, the ordinances allowed developers to achieve compliance with the off-street parking provisions by making payments of \$2,500 per space to the Town's Off-Street Parking Fund ("the Fund"). The Fund's purpose was to provide for acquisition and development of parking facilities and for replacement of existing parking structures. Plaintiffs offered to provide parking spaces, but these were located more than 500 feet from their site. In July 1981, plaintiffs paid into the Fund \$28,750, representing their required payment under the terms of the ordinances, and received their building permit in due course. Plaintiffs then proceeded to construct the restaurant in accordance with their plans; no additional parking spaces were constructed, acquired, or designated by plaintiffs within 500 feet. In 1982, plaintiffs instituted this action seeking recovery of the money paid and various injunctive relief, based on theories of negligence by the Town and of illegality and unconstitutionality of the Fund ordinance, both as written and as enforced. Following discovery, the Town moved for and obtained summary judgment. Plaintiffs appealed.

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Manning, Fulton & Skinner, by John B. McMillan and John I. Mabe, Jr., for plaintiffs.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by Michael W. Patrick, for defendant.

WELLS, Judge.

[1] Summary judgment is properly granted where the moving party establishes a complete defense as a matter of law. *Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), cert. denied, 307 N.C. 576, 299 S.E. 2d 645 (1983). Since the record conclusively shows that plaintiffs are estopped to deny the validity of the Town's ordinances, summary judgment was properly granted against them on their statutory and constitutional challenges to the ordinances.

It is well established that the acceptance of benefits under a statute or ordinance precludes an attack upon it. *Convent v. Winston-Salem*, 243 N.C. 316, 90 S.E. 2d 879 (1956); see also *Wall v. Parrot, Silver & Copper Co.*, 244 U.S. 407 (1917) (claim filed under statute prevented attack in collateral proceeding). A party may, by his or her conduct, be estopped to assert both statutory and constitutional rights. *Convent v. Winston-Salem, supra*; *Cameron v. McDonald*, 216 N.C. 712, 6 S.E. 2d 497 (1940). In *Convent v. Winston-Salem, supra*, our supreme court rejected a challenge to a zoning ordinance in an appeal from a denial of modifications to a special use permit, since the challengers had accepted the benefit of the original permit allowing them to operate a school in an otherwise residential area. In *Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 171 S.E. 2d 406 (1970), an application for certain territorial rights was held to preclude a challenge to the constitutionality of the statute authorizing the Utilities Commission to assign such rights. See also *City of Durham v. Bates*, 273 N.C. 336, 160 S.E. 2d 60 (1968) (property holders could not challenge eminent domain statute after accepting payment, even though they claimed reservation of rights); *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974) (county which exercised delegated tax power could not challenge constitutionality of certain exemptions).

It is undisputed in the present case that plaintiffs have in fact constructed their restaurant. Nowhere do plaintiffs challenge

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the Town's requirement of a certain number of off-street parking spaces for the restaurant. The Town's uncontradicted evidence shows that plaintiffs cannot physically construct the necessary number of spaces on site; nothing in the record suggests any effort by plaintiffs to provide the spaces elsewhere within the 500 foot distance. The Town's uncontradicted evidence also shows that under the terms of the ordinance plaintiffs could not have built a building of the size of the one actually constructed. Plaintiffs have never applied for a variance, and they have not offered to demolish their building, apparently the only other feasible alternative. We therefore hold that, having accepted the benefit of the payment scheme by constructing the restaurant in its present, otherwise illegal size, plaintiffs are estopped to challenge the validity of the ordinances. Summary judgment on plaintiffs' statutory and constitutional challenges was therefore proper.

We also overrule with this holding plaintiffs' contention that the Town has denied them their due process rights by not constructing parking spaces commensurate with the contribution to the Fund. Plaintiffs have already received the principal benefit of their contribution, the right to build a structure otherwise prohibited by the Town's ordinances. Nothing in the law or common sense requires or suggests that money collected into special purpose funds be spent immediately upon receipt; when and how it is spent remains essentially a legislative decision. Given the relatively small amount of money involved, the Town clearly cannot rely on the Fund to begin major acquisition or construction projects. To require it to use the Fund piecemeal as money is received would run contrary to the very goals of orderly and planned development inherent in our zoning law. See N.C. Gen. Stat. § 160A-383 (1982).

[2] Plaintiffs' remaining assignment of error concerns allegedly discriminatory actions by the Town in subsequently amending the ordinances to exempt churches in the CBD from the off-street parking provisions. They cite two actions: (1) a failed attempt by the Town's planning board to administratively circumvent the ordinances in favor of a single church, and (2) the amendment to the ordinances. With regard to the first, plaintiffs failed to show that the planning board's action resulted in any *actual* discriminatory treatment. See *Maines v. City of Greensboro*, 300 N.C. 126, 265 S.E. 2d 155 (1980). With regard to the second, a similar contention

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was summarily rejected in *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979) (also on appeal from summary judgment). Rather than discuss legislative motive, the supreme court simply concentrated on the reasonableness of the exclusion. *Id.* The court found the exclusion reasonable and accordingly directed summary judgment for the City. *Id.* Plaintiffs have not shown that the classification is unreasonable, other than to state that "it is common knowledge that churches operate throughout the week, and not only on Sunday mornings." By far and away the heaviest church traffic occurs on Sunday mornings, however, when the great majority of businesses are closed. The classification appears entirely reasonable. Plaintiffs failed to carry their burden of showing unreasonable classification. Their suggestion that the Town Council, by acting on the proposal of the planning staff, acted in an administrative capacity in legislatively amending the ordinances, disregards the purely advisory role of the planning staff. See N.C. Gen. Stat. § 160A-361 (1982); *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). This assignment of error is also without merit.

Plaintiffs do not pursue their negligence and fraud claims by assignment of error or in their brief. These claims are deemed abandoned and the summary judgment with respect to them is affirmed. Rule 10(a) and Rule 28(a) of the Rules of Appellate Procedure.

On the record before us, defendant Town of Chapel Hill was entitled to summary judgment in its favor on all claims. The trial court's order is therefore

Affirmed.

Chief Judge VAUGHN and Judge BECTON concur.

State v. Cameron

STATE OF NORTH CAROLINA v. JOHN ROBERT CAMERON

No. 8315SC1236

(Filed 18 December 1984)

1. Criminal Law § 138— strong provocation as mitigating factor—finding not required

Strong provocation as a mitigating factor is a conclusion which a court may or may not reach from uncontradicted evidence, and the trial court was not required to find strong provocation as a mitigating factor for a felonious assault and a second degree murder where there was evidence that defendant's wife told him that she had moved out of their home because of an adulterous relationship which she had maintained for six months and that she had her lover confirm the liaison by telephone.

2. Criminal Law § 138— prevention of jailbreak as mitigating factor—finding not required

Defendant's prevention of a jailbreak by other prisoners by telling the jailer of certain developments in the jail was not a mitigating factor which the trial court was required to find even if the evidence as to it was uncontradicted and credible.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Preston, Judge*. Judgment entered 21 April 1983 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 23 August 1984.

The defendant pled guilty to assault with intent to kill inflicting serious injury and second degree murder. The Court found one factor in aggravation, that the defendant acted with premeditation and deliberation. It found three factors in mitigation which were (1) that defendant had no prior record of criminal convictions, (2) that defendant voluntarily acknowledged his wrongdoing to a law enforcement officer at an early stage of the criminal process, and (3) that the defendant had a good reputation in the community in which he lived. The Court found that the aggravating factor outweighed the mitigating factors and imposed a 45-year sentence in the murder case for which the presumptive term is fifteen years and a ten-year sentence in the assault case, for which the presumptive term is six years.

The defendant appealed.

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Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Ross and Dodge, by Harold T. Dodge, for defendant appellant.

WEBB, Judge.

The defendant concedes the aggravating factor was properly found. See *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). He also concedes that determining the relative weight of the one aggravating and the three mitigating factors was within the discretion of the Court. See *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982). The defendant contends there was evidence which was uncontradicted and manifestly credible which required findings of two additional mitigating factors. See *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

[1] There was evidence that the defendant's wife told him that she had moved out of their home because of an adulterous relationship that she had maintained for six months, and when the defendant expressed disbelief and urged her to return home, she had her lover confirm the liaison by telephone. The defendant contends the Court should have found from this evidence that the defendant acted under strong provocation. See G.S. 15A-1340.4 (a)(2)i. We believe that "strong provocation" as a mitigating factor is a conclusion which a court may or may not reach from uncontradicted evidence. We hold it is not a fact which the court must find under the rule of *State v. Jones, supra*.

[2] There was testimony by an Alamance County law enforcement officer that while defendant was incarcerated awaiting trial he helped prevent a jailbreak by other prisoners by telling the jailer of certain developments in the jail. As a consequence the authorities discovered that several jail window bars had been sawed through and confiscated eighteen hacksaw blades. The defendant argues that although aiding in the prevention of a jailbreak is not a statutory mitigating factor it is related to the purposes of the sentencing and should have been found by the Court. We do not believe we should hold this is a mitigating factor which the Court must find if the evidence as to it is uncontradicted and credible. We do not believe we should make a rule that a sentencing judge has to anticipate mitigating factors not

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listed in G.S. 15A-1340.4 which we might think are related to the purposes of sentencing.

Affirmed.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Before imposing sentence the court was required, I think, to find and consider the two mitigating factors referred to in the majority opinion, both of which were indisputably and credibly established by the evidence in accord with the rule laid down in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). When the credible evidence at a sentencing hearing is such that it is possible to draw different conclusions, or no conclusion at all, from it, then, of course, the choice is that of the trial judge and it cannot be upset; but when the evidence is such that only one rational conclusion can be drawn from it and that conclusion is favorable to the defendant under the principles and purposes of the Fair Sentencing Act, I do not believe that the judge is at liberty not to draw it. That would be caprice, not law. In my opinion the only rational conclusion that can conceivably be drawn from the paramour's confirmatory and taunting telephone call to defendant is that, to say the very least, it was strongly provocative; and it can only be concluded, I think, that preventing a jailbreak is a valuable service to both law enforcement and public safety, each of which is obviously in accord with the highest purposes of sentencing. That preventing a jailbreak is not on the statutory list of mitigating factors which sentencing judges must consider is, in my opinion, immaterial since it is as strongly related to the purposes of sentencing as any of the factors that are on the list, and judges are expressly authorized to find other factors that serve the purposes of sentencing. Since the judge based the sentences imposed on aggravating and mitigating factors authorized by the Act, he had the plain duty, it seems to me, to give defendant credit for the valuable service that he admittedly and indisputably rendered to law enforcement and the public safety.

State ex rel. Grimsley v. West Lake Dev., Inc.

STATE OF NORTH CAROLINA EX REL. JOSEPH W. GRIMSLEY, SECRETARY
NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND
COMMUNITY DEVELOPMENT v. WEST LAKE DEVELOPMENT, INC.

No. 849SC153

(Filed 18 December 1984)

1. Contempt of Court § 7— failure to obey injunction—general manager imprisoned and fined

Where defendant corporation did not obey a mandatory preliminary injunction ordering the installation and maintenance of temporary erosion and sediment control devices, the court had the authority to order that defendant's general manager be imprisoned and fined. Findings that the manager directed defendant's operation and had notice of the order were supported by the evidence and brought him within the express provisions of G.S. 1A-1, Rule 65(b).

2. Contempt of Court § 8— stipulation to willful disregard of court order—no exception on appeal—defense of inability to comply precluded

Defendant could not present the defense of inability to comply after stipulating at trial to a finding that it had failed to install erosion control devices in willful disregard of a court order and did not except to that finding on appeal.

APPEAL by defendant from *Herring, Judge*. Order entered 4 November 1983 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 26 October 1984.

Plaintiff sought to restrain defendant and others under defendant's direction or control from violating provisions of the Sedimentation Pollution Control Act of 1973, N.C. Gen. Stat. 113A-50 *et seq.* The trial court entered a mandatory preliminary injunction ordering defendant to "install and . . . maintain temporary erosion control and sedimentation control devices and measures, acceptable to the state . . ." The order provided that it was "enforceable by and through the contempt powers of [the] court, pursuant to G.S. 5A-21, *et seq.*"

Upon plaintiff's motion the court subsequently ordered defendant to show cause why it should not be held in contempt for failure to comply with the foregoing order. At the show cause hearing counsel for both parties stipulated to the following findings of fact:

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1. That defendant corporation and its president, Jarrell Brock, had notice of the . . . order . . . on the day it was entered.

2. That by its terms the order required that the defendant establish adequate erosion control devices on the property . . . so as to prevent sediment from leaving the site and to prevent violation of the . . . Act

3. That although the time for complying with the order has expired defendant has failed to install adequate erosion control devices on the property and has failed to do so in willful disregard of this court's order.

The court concluded that defendant was in willful contempt. It ordered: that Jarrell Brock, defendant's president, be imprisoned for thirty days; that defendant pay a fine of \$1,000; that defendant take the necessary action to bring the property into compliance by 31 October 1983 as a condition of purging itself of contempt and having Brock's sentence suspended; and that defendant appear on 31 October 1983 to demonstrate that the property had been brought into compliance.

On 4 November 1983 the court entered a further order finding: that Brock is defendant's general manager rather than its president, and he directs the operation of the company; that defendant had failed to satisfy the court that the property was in compliance with the Act; that defendant had done a substantial amount of work toward bringing the property into compliance; but that defendant had failed in several respects to complete the erosion control measures called for in plaintiff's plan. The court concluded that defendant remained in violation of the Act and in contempt of its order. It ordered that Brock be imprisoned for seven days, rather than thirty as previously provided, and that Brock and defendant "jointly and severally" pay a fine of \$1,000.

Defendant appeals.

Walter M. Smith, Assistant Attorney General, for the State, plaintiff appellee.

Banzet, Banzet & Thompson, by Lewis A. Thompson, III, for defendant appellant.

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WHICHARD, Judge.

[1] Defendant contends the court lacked jurisdiction over its manager, Brock, and that the order imprisoning Brock for seven days and requiring him to pay a fine "was unlawful in that Brock had no notice that *he* might be held in contempt." We find the argument without merit.

The court found that Brock is defendant's general manager and directs its operation. Defendant has not excepted to this finding, and it is supported by competent evidence. Brock himself filed an affidavit stating that he is defendant's employee and "is responsible for the implementation of sedimentation and erosion control measures as they relate to that tract of land . . . which is the subject of this action." A witness for plaintiff testified that he had always dealt with Brock regarding erosion control measures on the subject property, and that Brock had always indicated that he "had the authority to deal for" defendant. Findings of fact in contempt proceedings are conclusive on appeal when supported by any competent evidence. *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E. 2d 129, 139 (1978); *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 211, 154 S.E. 2d 313, 317 (1967). The finding that Brock is defendant's general manager and directs its operation thus is conclusive.

The court also found that Brock had notice of its order. It made this finding upon stipulation of the parties, and defendant has not excepted to it. This finding thus is also conclusive. *Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 62 N.C. App. 205, 209, 302 S.E. 2d 848, 851-52 (1983).

G.S. 1A-1, Rule 65(d) provides that orders granting injunctions and restraining orders bind "the parties . . . , their officers, agents, servants, employees, and attorneys . . . who receive actual notice in any manner of the order" See *Trotter v. Debnam*, 24 N.C. App. 356, 361, 210 S.E. 2d 551, 554 (1975). The conclusive findings that Brock was defendant's manager and directed its operation, and that he had notice of the order, bring him within the express provisions of Rule 65(d). As a party's employee with actual notice, he was bound by the order.

"A command to [a] corporation is in effect a command to those who are officially responsible for the conduct of its affairs."

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Wilson v. United States, 221 U.S. 361, 376, 31 S.Ct. 538, 543, 55 L.Ed. 771, 777 (1911). "If they, apprised of the order directed to the corporation, prevent compliance, or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." 17 Am. Jur. 2d, Contempt § 12, at 17-18. See Annot., 7 A.L.R. 4th 893-929 (1981).

Applying these principles to the foregoing findings, we hold that the court had authority to punish Brock for defendant's willful contempt. It neither erred nor abused its discretion in doing so.

[2] Defendant further contends the court had to find that it had the capacity to comply, and that there was no evidence it had such capacity. At trial defendant stipulated to a finding "[t]hat although the time for complying with the order has expired defendant has failed to install adequate erosion control devices . . . and has failed to do so in willful disregard of [the] court's order." It has not excepted to this finding, and the finding thus is binding. *Homeowners Assoc.*, 62 N.C. App. at 209, 302 S.E. 2d at 851-52. This conclusive finding precludes presentation on appeal of a defense of inability to comply.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

WESLEY ARMSTRONG, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION,
EMPLOYER, AND LUMBERMANS MUTUAL INSURANCE COMPANY, CAR-
RIER, DEFENDANTS

No. 8410IC267

(Filed 18 December 1984)

Master and Servant § 68— workers' compensation—chronic obstructive lung disease—remand for proper findings

An action to recover workers' compensation for chronic obstructive lung disease must be remanded for proper findings where it is not clear from the Industrial Commission's conclusion as to the extent of plaintiff's disability whether the Commission weighed and considered plaintiff's age, education, experience and health as those factors affected plaintiff's ability to earn the

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wages he was earning with defendant employer in the same or any other employment or whether the Commission simply concluded that a ten percent physical impairment automatically translated into ten percent disability.

APPEAL by plaintiff from Industrial Commission's order entered 3 November 1983. Heard in the Court of Appeals 15 November 1984.

Plaintiff sought compensation for disability caused by chronic obstructive lung disease. The hearing officer, Deputy Commissioner Shuford, entered an order in which he found that plaintiff suffered from a chronic obstructive pulmonary condition which had been accelerated or aggravated by plaintiff's exposure to cotton dust while working in cotton mills, including defendant Cone Mills' mill, and concluded that plaintiff's disability amounts to approximately ten percent of plaintiff's wage earning capacity. He further found that plaintiff's average weekly wage was \$236.19 per week, and he awarded plaintiff compensation at the rate of \$15.75 per week.

Plaintiff appealed this order to the Full Commission which affirmed and adopted Deputy Commissioner Shuford's order in all respects. Plaintiff has appealed from the order of the Full Commission.

Charles R. Hassell, Jr. for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by William L. Young, for defendants.

WELLS, Judge.

In his sole argument, plaintiff contends that the Commission erred in failing to make appropriate findings of fact and conclusions of law on the issue of plaintiff's disability. More particularly, plaintiff argues that the Commission based its award only on the extent or percent of plaintiff's physical impairment, without considering and applying other evidence relating to plaintiff's disability or inability to earn wages. The standard of review is

In passing upon an appeal from . . . the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether or not there was any competent evidence before the Commission to support its

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findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.

Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E. 2d 101 (1981) (citations omitted). The dispositive question in this case is whether the Commission's findings of fact support its conclusion and decision that plaintiff's compensatory disease had reduced his capacity to earn wages by ten percent. In *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982), our supreme court held that the determination of whether a disability exists is a conclusion of law. N.C. Gen. Stat. § 97-2(9) (1979) defines disability for purposes of workers' compensation:

(9) Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

In a workers' compensation case, the claimant has the burden of proving both the extent of his disability and its degree. *Hilliard v. Apex Cabinet Co.*, *supra*.

In the case before us, the Commission found the following pertinent facts. Plaintiff, 68 years old, has a fourth grade education, and has worked in mills since "an early age."¹ During his employment in mills, including defendant's mill, plaintiff developed breathing problems, for which he takes medication. Plaintiff retired from mill employment at age 62. Since retiring from work, plaintiff has hauled some fruit from Florida. During the first year of such work, plaintiff made a profit of \$1800. Plaintiff's fruit hauling business thereafter proved unprofitable and plaintiff discontinued that work. Plaintiff's average weekly wage with defendant Cone Mills was \$236.19.² Plaintiff has a compensatory chronic obstructive pulmonary condition which was aggravated or accelerated by plaintiff's exposure to cotton dust while working for defendant Cone Mills, and such aggravation or acceleration has resulted in a reduction in plaintiff's wage earning capacity. The other pertinent findings of fact are found in paragraph six of the order, which we quote verbatim:

1. Plaintiff testified he began working in mills at age 14 or 15.

2. Based on this figure, plaintiff, if employed 50 weeks a year, would have earned \$11,809.50 per year.

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6. Plaintiff has been treated for and has taken medication for his breathing problem since before starting to work with defendant employer. In 1981 plaintiff was examined by Dr. Herbert A. Saltzman, medical expert of Durham specializing in pulmonary diseases. After examinations, Dr. Saltzman is of the opinion that while a case cannot be made for plaintiff having chronic byssinosis, a case can be made for aggravation of plaintiff's symptoms from exposure to cotton mill environment. The doctor believes that on a more likely than not basis such aggravation from exposure to the mill environment has contributed to plaintiff's overall impairment on an approximate basis of 10% to overall impairment.

Most of the material in paragraph six of the order is mere recitation of evidence and does not constitute findings of fact. It is clear, however, that the Commission, concluded that plaintiff had a ten percent disability based on Dr. Saltzman's testimony that plaintiff's compensatory disease contributed to plaintiff's "overall impairment on an approximate basis of 10%." This will not suffice to resolve the dispositive issue in this case; i.e., plaintiff's incapacity to earn wages. It is not clear from the Commission's conclusion as to the extent of plaintiff's disability whether the Commission weighed and considered plaintiff's age, education, experience and health, as those factors affected plaintiff's ability to earn the wages he was earning with defendant Cone Mills in the same or any other employment, or whether the Commission simply concluded that a ten percent physical impairment automatically translated into ten percent disability. It is settled law that a claimant, though physically able, may be unsuited for employment due to characteristics peculiar to him. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); see also *Hilliard v. Apex Cabinet Co.*, *supra*.

We remand this case for findings as to (1) whether plaintiff was incapable, after his injury, of earning the same wages he had earned before his injury in the same employment; (2) whether plaintiff was incapable, after his injury, of earning the same wages he had earned before his injury in any other employment; and (3) the extent of his ability to earn wages after his injury in the same employment; and (4) the extent of his ability to earn wages in any other employment. Based on such findings, the Com-

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mission may then reach a proper decision as to the extent of plaintiff's disability.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

EDWARD L. HAPONSKI v. CONSTRUCTOR'S INC., AND IOWA NATIONAL
MUTUAL INS. CO.

No. 8410IC49

(Filed 18 December 1984)

Master and Servant §§ 66, 96.5— evidence of maximum medical improvement sufficient to support findings—no direct evidence of psychological problems

There was sufficient competent evidence from plaintiff's doctor to support the Industrial Commission's finding that plaintiff had reached maximum medical improvement, even though another doctor consulted by plaintiff disagreed, where plaintiff's first doctor testified that numerous tests produced only "minimal" or "subtle" objective findings of physical disease or malfunction, where plaintiff had been treated "conservatively," and where the doctor had concluded prior to the hearing that he could not help plaintiff further. Even though plaintiff's first doctor thought that plaintiff should see a psychologist or psychiatrist, there was no direct evidence that plaintiff had psychological problems, and the Commission could disbelieve the doctor's conclusion, especially since that conclusion had no basis in professional psychological or psychiatric inquiry. G.S. 97-25.

APPEAL by claimant from the North Carolina Industrial Commission. Opinion and award filed 9 November 1983. Heard in the Court of Appeals 18 October 1984.

On 20 October 1980, the claimant Edward Haponski, an employee of Constructor's Inc., slipped and fell while helping to move crates at work, striking his head and shoulder against a wall. Prior to this accident, he had suffered two other industrial accidents, one on 12 September 1979, which resulted in surgery on his cervical spine, and the other on 24 June 1980.

After the accident of 20 October 1980, the claimant continued to work with Constructor's until he was laid off on 2 January 1981. During this time he suffered lower back pain and headaches.

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In September 1981, claimant was hospitalized and was conservatively treated. He was released on 28 September. He continued under the care of his doctor, Dr. Menno Pennink, until 14 November 1981, when Dr. Pennink advised him that he could return to work.

On his release from the hospital, claimant sought construction work, but without success. On 8 January 1982 claimant telephoned his doctor's office about severe back pain. Dr. Pennink's assistant advised him to remain at bed rest. He was hospitalized from 22-30 April 1982 and underwent a series of tests. None of these tests, however, indicated abnormalities significant enough to warrant surgery.

Claimant continued to complain of severe back pain, with radiation into his hips, buttocks, legs and groin. Dr. Pennink prescribed medication and physical therapy, but the pain persisted. When Dr. Pennink last saw the claimant, he was of the opinion that he had done all he could and that claimant required psychological or psychiatric help.

Claimant desired to be evaluated at the Duke University Medical Center. On 17 December 1982 he was examined by Dr. John Harrelson. Dr. Harrelson recommended that claimant undergo further diagnostic studies and, if it was determined that his pain could not be surgically treated, consult with the Duke Pain Clinic.

A hearing was conducted before Deputy Commissioner Linda Stephens on 12 January 1983. She concluded that claimant was temporarily totally disabled as a result of the injury suffered in the accident of 20 October 1980. She concluded also that claimant required additional medical treatment as recommended by Dr. Harrelson. The defendant-employer appealed to the Full Commission. On 9 November 1983, it found that the claimant had reached maximum medical improvement on 17 August 1982 and had suffered 20 percent permanent partial disability of the back.

Claimant now appeals the Full Commission's order.

Blanchard, Tucker, Twiggs, Earls & Abrams, by Douglas B. Abrams, for claimant appellant.

Russ, Worth, Cheatwood & McFadyen, by Walter Y. Worth, Jr., for defendant appellees.

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ARNOLD, Judge.

Claimant contends that, in light of testimony by claimant's doctors that he should see a psychiatrist or psychologist or consult with the Duke Pain Clinic, the Full Commission erred in finding that defendant had reached maximum medical improvement.

In assessing claimant's contention, the scope of our review is to determine whether competent evidence was before the Commission to support its findings of fact and whether, in turn, its findings justify its legal conclusions and decision. *See Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E. 2d 485, 488 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984). To determine whether there was competent evidence, we may not reweigh the evidence ourselves:

[B]ut may only determine whether there is evidence in the record to support the findings made by the Commission. If there is any evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Willis v. Drapery Plant*, 29 N.C. App. 386, 224 S.E. 2d 287 (1976).

Porterfield v. RPC Corp., 47 N.C. App. 140, 144, 266 S.E. 2d 760, 762 (1980).

Our review of the record convinces us that the Full Commission had competent evidence before it to support a finding that Mr. Haponski had achieved maximum medical improvement. Dr. Pennink testified that numerous tests done on Mr. Haponski produced only "minimal" or "subtle" objective findings of physical disease or malfunction. Dr. Pennink treated Mr. Haponski "conservatively" and prior to the hearing in this case, determined that he could not help Mr. Haponski any further, and that he was at a "standstill." He thought Mr. Haponski needed a psychiatrist or psychologist, and arranged an appointment with one, Dr. Gomez. Mr. Haponski, however, did not see Dr. Gomez, but instead consulted Dr. Harrelson of the Duke University Medical Center.

Dr. Harrelson found that, on the basis of x-rays done in April 1982, the claimant had degenerative disc disease. He recommended further evaluation and, if necessary, consultation with the Duke Pain Clinic. It is important to note that Dr. Pennink also

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found this evidence of degenerative disc disease, but was of the opinion that it constituted "minimal findings" and did not explain many if not most of Mr. Haponski's complaints. In his letter of 19 July 1982 to Iowa National Insurance Company, Dr. Pennink wrote that after Mr. Haponski was hospitalized for tests in 1982, he was "subsequently treated with continued bedrest and finally improved."

Doctors Pennink and Harrelson thus disagreed on the significance of physical findings as to the source of Mr. Haponski's pain. The Full Commission could disbelieve one or the other, and accept evidence given by one when it conflicted with that given by the other.

Claimant has presented no direct evidence that he has psychological problems. Indeed, he refused an appointment with a psychiatrist, arranged by Dr. Pennink. The only evidence in the record concerning psychological problems is the testimony of Dr. Pennink, a neurosurgeon, who has said that because he could find nothing significantly wrong with Mr. Haponski physically, he concluded that Mr. Haponski must need psychological help. The Full Commission could disbelieve Dr. Pennink's conclusion, especially since it had no basis in a professional psychological or psychiatric inquiry. "[T]he Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E. 2d 389, 390 (1980).

We find that in Dr. Pennink's testimony the Full Commission had competent evidence to conclude that the period of healing for Mr. Haponski's injury of 20 October 1980 was over, and that he had reached maximum medical improvement. The finding of maximum medical improvement supports the order and award given under the applicable statute. See G.S. 97-25; see also *Millwood v. Firestone Cotton Mills*, 215 N.C. 519, 2 S.E. 2d 560 (1939).

Affirmed.

Judges WELLS and HILL concur.

Falcone v. Juda

JOSEPH J. FALCONE AND WIFE, KATHERINE DIANE J. FALCONE v. EDWIN JUDA AND WIFE, LILLIAN M. JUDA

No. 8414SC424

(Filed 18 December 1984)

1. Appeal and Error § 6.2— summary judgment—counterclaim remaining—no right of immediate appeal

An order granting summary judgment on plaintiff vendors' claim for cancellation of a notice of the purchaser interest was interlocutory since defendant purchasers' counterclaim for the down payment and other monies paid to plaintiffs remained to be adjudicated, but the appeal was treated as a petition for certiorari and was allowed.

2. Vendor and Purchaser § 4— cancellation of notice of purchasers' interest—title not relevant

An issue of title was not relevant to plaintiff vendors' right to cancellation of a notice of purchasers' interest upon default by defendant purchasers where the contract between the parties provided that upon default the purchasers would forfeit and the vendors would be reinvested with title, and cancellation of the notice was thus not dependent on the validity of plaintiffs' title but was a matter of contract between the parties.

3. Mortgages and Deeds of Trust § 1.1— counterclaim for down payment and monies paid—no equitable lien

A counterclaim by the defaulting purchasers of land for the return of a down payment and other monies paid to the vendors did not give rise to an equitable lien since no express contract created a lien and no special factors such as a confidential relationship justified a lien by implication.

APPEAL by defendants from *Barnette, Judge*. Judgment entered 12 December 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 December 1984.

Plaintiffs as sellers and defendants as buyers entered into an installment land contract on 14 July 1981. The contract provided that a down payment be made upon execution of the contract, and the balance, plus interest, be paid on or before 1 July 1982; it also provided for defendants to pay plaintiffs 12 smaller monthly installments beginning July 1981, which payments were to be applied first to the interest and then to the principal. Should the vendee (defendants) fail to perform the terms of the contract, the vendor (plaintiffs) was to be "fully and completely reinvested," and the vendee was to forfeit, "all right, title and interest" in and to the property. Also on 14 July 1981, the parties executed a

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document entitled "Notice of Purchaser's Interest." The notice stated that the defendants had agreed to buy and the plaintiffs to sell the property in question. It was recorded by the Durham County Register of Deeds on 6 August 1981.

On 13 June 1983, plaintiffs filed a complaint alleging that defendants had defaulted on the contract for deed, yet refused plaintiffs' request to release the notice of purchaser's interest. In their prayer for relief the plaintiffs requested that the court order that the notice be cancelled. Defendants answered, denying plaintiffs' allegations, and also counterclaimed for money damages for the down payment and other monies paid to plaintiffs on the grounds that the contract for deed was unenforceable, and alternatively, if enforceable, the monies should be considered a penalty and not liquidated damages. In their reply, plaintiffs denied that the contract was unenforceable, and also alleged certain sums of money as a setoff to any claims made against them.

Plaintiffs then moved for, and were granted, a summary judgment ordering the Register of Deeds to cancel the Notice of Purchaser's Interest. From order granting summary judgment, defendants appeal.

Harriss, Embree & Marion, by Joseph W. Marion, for plaintiff-appellees.

Cooper, Williams & Bryan, P.A., by James T. Bryan, III, for defendant-appellants.

VAUGHN, Chief Judge.

[1] The order, which granted summary judgment on plaintiffs' claim, is not a final judgment, but is interlocutory, as defendants' counterclaims remain to be adjudicated. Although an appeal does not customarily lie from an interlocutory order, an exception is made if such order deprives the appellant of a substantial right which will be lost if the ruling is not reviewed before final judgment. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). In other words, immediate appeal from nonfinal orders is reserved for cases in which normal procedural channels are inadequate to protect the substantial right affected. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). Appealability of a particular order is usually resolved by

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considering the facts of that case and the procedural context in which the order was entered. *Id.* We do not decide whether the appeal lies as a matter of right. We instead treat the appeal as a petition for certiorari, allow it, and consider the matter on its merits.

Summary judgment is granted if the pleadings, together with supporting materials, "show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), N.C. Rules Civ. Proc. *See generally*, Shuford, North Carolina Civil Practice and Procedure § 56-7 (2d ed. 1981). Defendants attempt to locate a genuine issue of material fact in three separate areas: whether plaintiffs have title to the land, whether defendants defaulted under the contract for deed, and whether defendants have an equitable lien against the land in question. We find each of defendants' arguments unpersuasive and therefore affirm.

[2] First, title is not at issue here. The issue is whether the notice of purchaser's interest should be cancelled. The contract of deed provides that upon defendants' default, the defendants shall forfeit and the plaintiffs shall be reinvested with title to the property. The cancellation of the notice, crucial to plaintiffs' resumption of title, is not in any way dependent on the validity of plaintiffs' title. Rather, reinvestment with title is a matter of contract between the parties, triggered by defendants' default under the contract.

Second, there is no question but that defendants defaulted under the contract. The contract provides that upon the failure of the defendants to pay the principal or interest, the plaintiffs are to be reinvested with title. In defendants' verified answer, they explicitly state that the contract was "terminated," that they discontinued their monthly payments to the plaintiffs after having made only ten of them, and that they attempted to secure alternate financing to pay the principal balance, but were unable to do so prior to 1 July 1982. Defendants' own admissions, then, establish a default under the contract of sale.

Defendants' final argument is that summary judgment was inappropriately granted because there remains a question of fact whether their counterclaim for money damages creates an equitable lien against the property in dispute. Our examination of

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the record satisfies us that the materials presented upon the motion for summary judgment do not give rise to a triable issue of fact as to the existence of an equitable lien.

[3] An equitable lien is not an estate in land, but is an equitable encumbrance upon land, "a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists." *Fulp v. Fulp*, 264 N.C. 20, 24, 140 S.E. 2d 708, 712 (1965). Such liens may be created by express contract or arise by implication. They most frequently arise by implication when one person has wrongfully expended another person's funds for improvements to the former's property, although the remedy is not limited to those cases. *Id.* The Supreme Court in *Fulp* noted that the remedy of an equitable lien "is not a necessary incident to the action for money had and received but results only when there are factors invoking equity, here the confidential relationship." *Id.* at 25, 140 S.E. 2d at 713. *Accord, Richardson v. Carolina Bank*, 59 N.C. App. 494, 297 S.E. 2d 197 (1982); *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980); 51 Am. Jur. 2d *Liens* § 24 (1970) (apply doctrine only in cases where the law fails to give relief and justice would suffer without it). It is obvious, therefore, that defendants have no grounds on which to base the existence of an equitable lien. No express contract creates a lien, and no special factors such as a confidential relationship justify a lien by implication.

Affirmed.

Judges WEBB and HILL concur.

NANCY H. KEZIAH, WIDOW OF JOHN W. KEZIAH, JR., DECEASED, EMPLOYEE V.
MONARCH HOSIERY MILLS, EMPLOYER, AND STANDARD FIRE INSUR-
ANCE COMPANY, CARRIER

No. 8410IC274

(Filed 18 December 1984)

**Master and Servant § 55.4— accidental death while returning from golf tourna-
ment—arose out of and in the course of employment**

There was sufficient evidence for the Industrial Commission to find that plaintiff's husband was acting in the furtherance of his employer's business,

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and therefore to conclude that his death arose out of and in the course of his employment, where plaintiff's husband died in a plane crash while returning from playing in a golf tournament in Florida; where plaintiff's husband was vice-president for sales in a company which manufactured golf socks; made a business practice of attending golf tournaments and sometimes played in them; often sent donations of socks to tournaments for distribution in registration packets; personally donated socks to individual professionals; sometimes played golf with customers and took customers to tournaments at company expense; had told other employees that he viewed the trip as an opportunity to promote the company's golf socks; and returned a business call during the trip, then called the company to place a customer's order. Furthermore, the tournament was prestigious and attended by many people expected to be future golf professionals and potential customers, the company donated 35 dozen socks for distribution to participants, plaintiff's husband was not considered to be on vacation during the week he spent at the tournament, and the company paid charges to its American Express card for plaintiff's husband's hotel room and a meal. G.S. 97-2(6).

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 6 January 1984. Heard in the Court of Appeals 16 November 1984.

Defendants appeal from an award of workers' compensation benefits.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan and Harold W. Beavers, for plaintiff appellees.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., and Caroline Hudson, for defendant appellants.

WHICHARD, Judge.

John W. Keziah died in a plane crash while returning home after playing in the American Amateur Golf Classic in Pensacola, Florida. At the time of his death he was vice president in charge of sales for Monarch Hosiery Mills. The plaintiff, Keziah's widow, filed a claim under the Workers' Compensation Act. A deputy commissioner conducted a hearing and denied the claim on the ground that the death did not arise out of and in the course of the employment. She found that the trip was made primarily for social reasons and that any benefit to Keziah's employer was incidental. The plaintiff appealed to the Full Commission, which reversed and awarded compensation. Defendants appeal.

The issue is whether competent evidence supports the findings of the Commission and its conclusion that Keziah's death

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arose out of and in the course of his employment. We hold that sufficient competent evidence was adduced to support the Commission's finding of fact that a principal purpose of Keziah's participation in the tournament was the furtherance of his employer's business. That finding supports and justifies the Commission's conclusion that Keziah's accidental death during the trip arose out of and in the course of his employment.

The record includes the following evidence: As vice president in charge of sales, Keziah made a business practice of attending golf tournaments, sometimes playing in them. One of the products manufactured by Monarch was a golf sock. Keziah often sent donations of those socks to various golf tournaments for distribution in a registration packet for tournament participants. He also personally made donations of socks to individual golf professionals. He sometimes played golf with customers and took customers to golf tournaments at company expense. These activities were aimed at promoting the sock among golf professionals, thereby increasing orders for the socks to be stocked and sold by golf shops. Additional sales resulted from individual customer orders as the socks became better known. Testimony indicated that results of this type of promotional activity ordinarily appear "way down the road" and indirectly.

The American Amateur Golf Classic was a prestigious tournament attended by many people expected to be future golf professionals and potential customers of Monarch. Before traveling to the tournament, Keziah told two persons on separate occasions that he viewed the trip as an opportunity to promote the golf socks sold by his company. Also, the president of Monarch testified that Keziah told him the tournament was an opportunity to "meet a lot of people down there, and in that respect, the way he operated, . . . it would have been business orientated [sic] to him." Defendants have not excepted to the admission of those statements. Such hearsay testimony is competent evidence, admissible on two separate grounds as exceptions to the general rule of inadmissibility. *Long v. Paving Co.*, 47 N.C. App. 564, 570-72, 268 S.E. 2d 1, 5-6 (1980).

Monarch's president prepared and signed the workers' compensation claim form which indicates Keziah died on a "business trip." Keziah was to be paid a salary during the week he spent at

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the tournament, and Monarch did not consider him to be on vacation. He used Monarch's American Express card to pay for his hotel room and a meal, charges which were later paid by Monarch. Monarch donated thirty-five dozen golf socks to the tournament for distribution to participants. During the week, Keziah returned a business call to a previous customer and, apparently, then called Monarch to place the customer's order for golf socks.

The above competent evidence indicates that both Keziah and Monarch considered the trip a "business trip," and that Keziah's participation in the tournament was consistent with his customary business practices. From the evidence, it was reasonable for the Commission to infer and to find that "a principal purpose of his participation in the . . . tournament was the furtherance of his employer's business." A finding supported by competent evidence is binding on appeal. *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964); *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 586, 281 S.E. 2d 463, 465 (1981).

Defendants argue that other evidence in the record indicates that Keziah may have had personal, non-business reasons for going to the tournament. They point out that he was a golf enthusiast who enjoyed the opportunity to play in the prestigious invitation-only tournament. However, where competent evidence supports the findings of the Commission, this Court does not re-evaluate the weight of conflicting evidence. Further, the Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents; its benefits should not be denied by a technical, narrow, and strict construction. *Hinson v. Creech*, 286 N.C. 156, 161, 209 S.E. 2d 471, 475 (1974).

Pursuant to N.C. Gen. Stat. § 97-2(6), a compensable injury under the Workers' Compensation Act must be one "arising out of and in the course of the employment." An injury is said to arise out of and in the course of the employment when it occurs while the employee is engaged in a duty which he or she is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. *Martin v. Bonclarken Assembly*, 296 N.C. 540, 544, 251 S.E. 2d 403, 405 (1979); *Long v. Paving Co.*, 47 N.C. App. 564, 566, 268 S.E. 2d 1, 3 (1980).

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It is undisputed that the employer-employee relationship existed at the time of Keziah's death and that he died in an accident during his return from the Pensacola trip. The record indicates that Keziah's position in the company permitted him much discretion in his business activities. Additionally, Keziah had informed Monarch's president of his trip plans two or three days before his departure.

From its permissible finding that Keziah's participation in the tournament was calculated to further Monarch's business, the Commission reasonably concluded that the fatal injuries Keziah sustained during his return trip arose out of and in the course of his employment. Therefore, his widow was entitled to compensation, and the order and award must be affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

RICKY DALE SANDERS v. JOYCE J. BRANTLEY, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF GEORGE OLIVER JOYNER, JR., JACQUELIN ANN JOYNER, GEORGE O. JOYNER, III, GREGORY ALLEN JOYNER, DEBBIE DIANA JOYNER, AND PEOPLES BANK AND TRUST COMPANY

No. 837SC1258

(Filed 18 December 1984)

Descent and Distribution § 8— guilty plea in criminal bastardy action—acknowledgment of paternity—right of illegitimate to inherit from father

An illegitimate child may inherit, through intestate succession, from the estate of a father who acknowledged paternity of the child by pleading guilty in a criminal bastardy action since the guilty plea constituted an acknowledgment of paternity within the meaning of G.S. 29-19(b)(2).

APPEAL by defendants from *Small, Judge*. Judgment entered 16 September 1983 in Superior Court, NASH County. Heard in the Court of Appeals 24 September 1984.

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Narron, O'Hale, Whittington & Woodruff, P.A., by O. Hampton Whittington, Jr., for plaintiff appellee.

Fields, Cooper & Henderson, by Leon Henderson, Jr., for defendant appellant.

JOHNSON, Judge.

The issue presented by this appeal is whether an illegitimate child may inherit, through intestate succession, from the estate of a father who acknowledged paternity to the child by pleading guilty in a criminal bastardy action. The trial court held that plaintiff was entitled to inherit. For the reasons that follow, we affirm the trial court's decision.

Plaintiff was born out of wedlock to Patricia Bailey on 14 December 1963. On 31 August 1964, George Oliver Joyner, Jr. (Joyner), plaintiff's father, entered a plea of guilty to a criminal charge of bastardy and thereafter made regular support payments for the benefit of plaintiff until his death on 6 February 1974. During his lifetime, Joyner gave presents to plaintiff. Following the death of Joyner as the result of a gunshot wound, plaintiff received social security survivor's benefits on Joyner's account. Joyner never denied that plaintiff was his son.

Joyner never married Patricia Bailey nor executed a will. Joyner was survived by his widow, Thelma B. Joyner; his four children by Thelma B. Joyner, defendants Jacquelin Ann Joyner, George O. Joyner, III, Gregory Allen Joyner and Debbie Diana Joyner; and plaintiff. Thelma B. Joyner died thirty minutes after Joyner, also from a gunshot wound. At the time of his death, Joyner owned two tracts of real property consisting of 38.8 acres and 37.5 acres.

The intestate succession by, through and from illegitimate children is governed by G.S. 29-19. At the time of Joyner's death, G.S. 29-19(b) provided in pertinent part:

(b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:

- (1) Any person who has been judicially determined to be the father of such child pursuant to the provisions of G.S. 49-14 through 49-16;

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- (2) Any person who has acknowledged himself during his own lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-6(c) and filed during his own lifetime in the office of the clerk of superior court of the county where either he or the child resides.

G.S. 29-19(b). We agree with the trial court that plaintiff is entitled to inherit through the provisions of subsection (b)(2). Joyner was charged in a written instrument with the paternity of plaintiff. By his plea of guilty, Joyner acknowledged the paternity of plaintiff before a judge, one of the certifying officers listed in G.S. 52-6(c). This acknowledgment was accepted by the judge and recorded in a written instrument and in the written minutes filed in the office of the clerk of superior court.

Our holding is consistent with the trend towards abolishing obstacles to the inheritance rights of illegitimates. Although not applicable to the case *sub judice*, we note that the General Assembly amended G.S. 29-19(b)(1) in 1977 to read that an illegitimate child shall be entitled to take by, through and from:

- (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through G.S. 49-16;

G.S. 29-19(b)(1) (Cum. Supp. 1983). This amendment was specifically made effective to estates of decedents dying on or after 1 September 1977. G.S. 29-19(b)(2), under which we are proceeding, was not changed by the General Assembly. Moreover, the General Assembly significantly broadened the inheritance rights of illegitimates by allowing inheritance by, through and from one who has been adjudged the father in a criminal action, irrespective of whether the putative father admitted paternity. In some cases, even when the putative father has been adjudged to be the father, the putative father still refuses to acknowledge paternity. In the present case, Joyner voluntarily acknowledged paternity. Joyner had a right to plead not guilty and to demand a trial, but he consciously chose not to exercise those rights in acknowledgment of paternity. We hold that Joyner's guilty plea constituted an acknowledgment within the meaning of G.S. 29-19(b)(2).

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For the foregoing reasons, the judgment of the trial court is
Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

TINA MARIE BRIDGERS v. WHITEVILLE APPAREL CORPORATION

No. 8413DC440

(Filed 18 December 1984)

Master and Servant § 10.2— workers' compensation claim—retaliatory discharge—judgment on the pleadings proper

Judgment on the pleadings for defendant in a retaliatory discharge action arising from a workers' compensation claim was appropriate where both the complaint and answer asserted that plaintiff had received permanent partial disability compensation. The plain and unambiguous language of G.S. 97-6.1(e) allows an employer to discharge an employee who has received permanent disability compensation. G.S. 1A-1, Rule 12(c).

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 28 February 1984 in District Court, BLADEN County. Heard in the Court of Appeals 6 December 1984.

Plaintiff brought this action against defendant under G.S. 97-6.1 for retaliatory discharge. Her complaint made the following allegations: Plaintiff was injured while working for defendant and placed on leave of absence until 8 August 1983. She filed a workers' compensation claim for her injury. On 8 August 1983 plaintiff returned to work to find that she "no longer had her job with the [d]efendant, and the [d]efendant extended [her] leave of absence indefinitely." Plaintiff alleged that defendant discharged her for filing a claim for unemployment benefits after 8 August 1983. Defendant rehired her on 26 September 1983. On 28 September 1983 plaintiff reached a settlement with defendant's insurance carrier for permanent partial disability. Defendant fired her two days later, which she alleged was in retaliation for her workers' compensation settlement.

Defendant denied having ever discharged plaintiff.

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The trial court granted defendant's motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c). Plaintiff appealed.

Hester, Johnson & Johnson, by H. Clifton Hester, for plaintiff, appellant.

Lee & Lee, by J. B. Lee, III, for defendant, appellee.

HEDRICK, Judge.

Judgment on the pleadings is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974). All facts and permissible inferences must be viewed in the light most favorable to the nonmoving party. *Id.*

Plaintiff contends the pleadings raise a factual issue as to whether she has a claim for relief under G.S. 97-6.1. That statute provides in pertinent part:

(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

. . .

(e) The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent disability, total or partial, shall in no manner be deemed a violation of this section.

The trial court granted judgment on the pleadings because both the complaint and answer asserted that plaintiff had received permanent partial disability compensation, thereby barring her statu-

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tory claim under G.S. 97-6.1(e). North Carolina does not recognize a claim for relief apart from G.S. 97-6.1 for a discharge in retaliation for filing a workers' compensation claim. *Dockery v. Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978).

Plaintiff argues that G.S. 97-6.1(e) has no application to this case since the words "to continue" only apply where the employment relationship continued from the time of injury to the time of compensation. Her complaint alleges that her employment was not continuous from the time of her injury to the time she received her permanent disability settlement.

No reasonable construction of G.S. 97-6.1(e) supports plaintiff's argument. The disputed factual issue of whether she was discharged prior to her September rehiring and firing is not material to her claim for relief. The plain and unambiguous language of G.S. 97-6.1 allows an employer to discharge an employee who has received permanent disability compensation without being liable under G.S. 97-6.1(a) and (b) for retaliatory discharge. To state that the employment relationship must have been continuous from injury to compensation before the employer is entitled to the protection of G.S. 97-6.1(e) is to read words and meaning into the statute that were not stated or intended by the legislature. The allegation in plaintiff's complaint that she has received permanent partial disability compensation creates an insurmountable bar for any recovery under the statute.

Affirmed.

Judges WHICHARD and EAGLES concur.

Sawyer v. N.C. Farm Bureau Mut. Ins. Co.

RONALD M. SAWYER v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 842SC247

(Filed 18 December 1984)

Insurance § 76— automobile fire insurance—renewal check not received within grace period—no retroactive renewal

Where defendant insurer provided a seventeen-day grace period for retroactive renewal of an automobile fire insurance policy but did not receive plaintiff's renewal check until after the grace period had expired, defendant had a right not to renew the policy retroactively even though plaintiff may have placed his renewal check in the mail within the grace period. Defendant was not estopped by any course of dealings where payments on previous occasions had been received by defendant within the grace period.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 20 January 1984 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 15 November 1984.

This is an action on a fire insurance policy. The plaintiff alleged that his automobile was destroyed by fire on 27 June 1981 while it was covered by an insurance policy issued by the defendant. The plaintiff prayed for judgment of \$9,500.00, which he alleged was the fair market value of the vehicle.

The case was submitted for a non-jury trial upon affidavits and documentary evidence. The Court made findings of fact which are not in dispute. The Court found among other facts that the plaintiff was covered by an insurance policy with effective dates from 11 December 1980 to 11 June 1981. On 27 May 1981 the defendant mailed to plaintiff a notice that the premium was due on 11 June 1981 and the policy would expire on that date if the premium was not paid. On 19 June 1981 a past due reminder was mailed to the plaintiff. On 26 June 1981 the plaintiff mailed a check to the defendant to pay the premium. The envelope in which the plaintiff mailed the check was postmarked 29 June 1981 and was received by the defendant on 30 June 1981. The defendant declined to renew the policy as of 11 June 1981 but reinstated it with effective dates of 30 June 1981 to 30 December 1981. The plaintiff's vehicle was damaged by fire on 27 June 1981. It had been a policy of the defendant to extend a grace period of seven-teen days to its insureds so that the defendant would retro-

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actively renew a policy if the premium was received within the seventeen-day grace period. In previous years the plaintiff had regularly paid the premium within the grace period and had the policy renewed retroactively. The Court concluded that since the plaintiff placed a check for the premium in the mail within the grace period it was deemed to have been received by the defendant at the time it was mailed and the policy was renewed retroactively to 11 June 1981.

The Court entered a judgment for the plaintiff and the defendant appealed.

Hutchins and Thompson by R. W. Hutchins for plaintiff appellee.

Baker, Jenkins and Jones by Ronald G. Baker and W. Hugh Jones, Jr. for defendant appellant.

WEBB, Judge.

As a general rule, the failure of an insured to pay a premium by the due date results in a lapse of coverage as of the last day of the policy period. *Klein v. Ins. Co.*, 289 N.C. 63, 220 S.E. 2d 595 (1975) and *Cauley v. Ins. Co.*, 219 N.C. 398, 14 S.E. 2d 39 (1944). An insurer may by extensions or periods of grace extend it on any terms he chooses. In this case it is undisputed that the defendant extended a grace period on condition that it receive the premium payment within the grace period. When it did not receive the premium payment it had the right not to renew the policy retroactively. The defendant was not estopped by any course of dealings. All the payments on previous occasions had been received by it within the grace period. It was error not to enter judgment for the defendant.

The appellee argues that he sent one check to pay the premium on two policies and the defendant reinstated the coverage for one of them retroactively to 11 June 1981 but refused to so reinstate the policy on which this action is based. The appellee argues this is not consistent with good honorable business practices. We cannot enforce any business practice for the defendant. It had the right not to reinstate the plaintiff's policy retroactively and we are bound by that right.

Chloride, Inc. v. Honeycutt

We reverse and remand for a judgment consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and HILL concur.

CHLORIDE, INC. v. COY E. HONEYCUTT

No. 8419SC452

(Filed 18 December 1984)

Rules of Civil Procedure § 52.1— findings of fact—recapitulation of testimony—insufficient

The court did not comply with G.S. 1A-1, Rule 52(a)(1) where the findings of fact, other than three jurisdictional type findings, consisted of recapitulations of the testimony of the witnesses and of the exhibits produced by both parties, and the conclusions of law consisted of statements that plaintiff failed to carry its burden of proof on various issues.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 21 December 1983 in Superior Court, CABARRUS County. Heard in the Court of Appeals 7 December 1984.

This is an action to recover the amount due on an alleged contract between plaintiff and defendant. At the conclusion of the bench trial, the court entered judgment for the defendant.

Williams, Boger, Grady, Davis & Tuttle, P.A., by Samuel F. Davis, Jr., and Brice J. Willeford, Jr., for plaintiff-appellant.

Cecil R. Jenkins, Jr., for defendant-appellee.

JOHNSON, Judge.

Plaintiff contends that the court erred by failing to make specific findings of fact as required by G.S. 1A-1, Rule 52(a)(1). We agree. Other than three jurisdictional-type fact findings, the court's "findings of fact" in the present case consisted of recapitulations of the testimony of the witnesses and of the exhibits, produced by both parties. The court's "conclusions of law"

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consisted of statements that plaintiff failed to carry its burden of proof on various issues.

G.S. 1A-1, Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The court must itself determine what facts are established by the evidence rather than merely reciting what the evidence may tend to show. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980); *Davis v. Davis*, 11 N.C. App. 115, 180 S.E. 2d 374 (1971). As we noted in a footnote in *Kraemer v. Moore*, 67 N.C. App. 505, 505, 313 S.E. 2d 610, --- (1984), "recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." It is not for us, as an appellate court, to determine the weight and credibility to be given evidence in the record. *Coble v. Coble, supra*. Rather than resolving conflicts in the evidence, the court's findings in the present case create conflicts. The court's statements that plaintiff failed to carry its burden of proof do not rescue its findings. See *Lowe's v. Thompson*, 26 N.C. App. 198, 214 S.E. 2d 813 (1975).

Without proper findings of fact, we cannot perform our review function even though there may be evidence to support the judgment. *Farmers Bank v. Brown Distributors*, 307 N.C. 342, 298 S.E. 2d 357 (1983). The judgment must, therefore, be vacated and the cause remanded for a new trial so that the court can make proper findings of fact and conclusions of law based thereon. *Id.*

Vacated and remanded.

Judges BECTON and BRASWELL concur.

Asad v. Asad

BOBBIE MATTHEWS ASAD v. MAJDI SHAKIR ASAD

No. 8410DC285

(Filed 18 December 1984)

Appeal and Error § 6.2— order for blood tests—no immediate appeal

Where a divorce judgment found that one child was born of the marriage and plaintiff thereafter made a motion for custody and support of the child, the trial court's interlocutory order requiring the parties and the child to submit to blood tests did not affect a substantial right and was not immediately appealable even though plaintiff contended that the paternity issue was *res judicata*.

APPEAL by plaintiff from *Creech, Judge*. Order entered 5 December 1983 in District Court, WAKE County. Heard in the Court of Appeals 27 November 1984.

The plaintiff filed this action for divorce in Harnett County. On 14 June 1983, Judge Pridgen entered a judgment granting an absolute divorce. Included in Judge Pridgen's findings of fact was the finding that one child, Magda Hadassah Asad, was born of the marriage. The case was transferred to Wake County where on 5 August 1983 the plaintiff made a motion for custody and child support. The defendant responded to this motion by denying paternity and asking the court to order the parties and the minor child to submit to blood tests. Judge Creech granted the defendant's motion. The plaintiff appealed.

Victoria Bender for plaintiff appellant.

Blanchard, Tucker, Twiggs, Earls and Abrams, P.A., by Howard F. Twiggs for defendant appellee.

WEBB, Judge.

Neither party has raised the question of the appealability of the order. When a party has no right to an appeal this Court on its own motion should dismiss the appeal. *Metcalf v. Palmer*, 46 N.C. App. 622, 265 S.E. 2d 484 (1980). The order by Judge Creech does not dispose of the case. Further action will be required to determine the entire controversy which makes Judge Creech's order interlocutory. We do not believe this order affects a substantial right of the plaintiff so that any injury to her may not

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be corrected if she is not allowed to appeal before there is a final judgment. See *Industries v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

The plaintiff contends the paternity issue is res judicata and any further litigation as to it is barred. If she is correct the most the plaintiff will suffer is a trial on that issue. We have held that the requirement that a party go through a trial is not an injury which cannot be corrected if an appeal is not allowed before a final judgment. *State v. Jones*, 67 N.C. App. 413, 313 S.E. 2d 264 (1984).

For the reasons stated in this opinion we dismiss the appeal.

Appeal dismissed.

Judges HEDRICK and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 DECEMBER 1984

EMPLOYMENT SECURITY COMM. v. LACHMAN No. 8410SC336	Wake (83CVS3042) Formerly #79CVS5532)	Affirmed
HARGROVE v. DeBOSE No. 847SC545	Wilson (82CVS79)	Reversed & Remanded
HAWKINS v. CONNELL No. 8414SC294	Durham (83CVS220)	Reversed & Remanded
HERRAN v. LIBERTY MUTUAL INS. No. 8426SC249	Mecklenburg (82CVS10208)	Affirmed
HUGHES v. HUGHES No. 8428DC567	Buncombe (82CVD1739)	Appeal Dismissed
HUNT v. BENNETT No. 8417SC277	Stokes (82CVS317)	Affirmed
IN RE DEWESS No. 8425DC288	Caldwell (83J70) (83J71) (83J72)	Affirmed
IN RE JUDGE TUCKER No. 845SC280	New Hanover (84CVS25)	Affirmed
JONES v. JONES No. 8410DC349	Wake (81CVD5621)	Affirmed
LOWDER v. ALL STAR MILLS No. 8420SC240	Stanly (79CVS015)	Affirmed
McADAMS v. OAKLEY No. 8415SC180	Orange (82SP215)	Affirmed
MASS. GENERAL LIFE INS. v. EDWARDS No. 847SC422	Wilson (82CVS557)	Reversed & Remanded
PAGE v. SPENCE No. 8411SC426	Lee (82CVS0938)	New Trial(d)
SHAW v. SHAW No. 8421DC237	Forsyth (77CVD700)	Vacated & Remanded
STATE v. HAWKINS No. 848SC592	Lenoir (83CRS7298)	No Error

STATE v. HERBIN No. 8422SC298	Davie (83CRS1662) (83CRS1663) (83CRS1664) (83CRS1665) (83CRS1666)	No Error
STATE v. JOINES No. 831SC700	Dare (82CRS5426) (Originally filed in Currituck Co. 81CRS2843)	No Error
STATE v. KING No. 8417SC225	Surry (82CRS3321) (83CRS3322) (83CRS3323)	Vacated & Remanded
STATE v. LEDBETTER No. 8427SC281	Gaston (82CRS17706)	No Error
STATE v. SMITH No. 8418SC282	Guilford (83CRS25345)	No Error in Trial; Remanded for Resentencing
STATE v. STINSON No. 8419SC483	Cabarrus (83CRS7574)	No Error
STATE v. WINEMILLER No. 8426SC615	Mecklenburg (83CRS43864) (83CRS43867)	No Error
STOWE v. STOWE No. 8427SC63	Gaston (83CVS391)	Reversed & Remanded
VAUGHN v. MEBANE No. 8415SC54	Orange (72CVS37) (82CVS1011)	No Error

APPENDIX

**ERRATUM
AMENDMENTS TO RULES OF
APPELLATE PROCEDURE**

ERRATUM

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

In the Amendments to Rules of Appellate Procedure printed in 70 N.C. App. 793, 808, the time for filing the record on appeal after the record on appeal has been settled was incorrectly stated in Rule 12(a) as being 10 days rather than 15 days. Rule 12(a) should read as follows:

- (a) **Time for Filing Record on Appeal.** Within *15 days* after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

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ROBBERY
RULES OF CIVIL
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SALES
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UNFAIR COMPETITION
UNIFORM COMMERCIAL
CODE

VENDOR AND
PURCHASER
VENUE

WAIVER
WILLS

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

In an action arising from a drainage problem in a newly constructed house, the court did not err in finding that plaintiff had not entered into an accord and satisfaction. *Coble v. Richardson Corp.*, 511.

ADVERSE POSSESSION

§ 17.1. Color of Title; Deeds Generally

Where a deed conveying a driveway easement required the grantee and his assigns to maintain an all weather driveway over the right-of-way conveyed and provided that, if they failed to do so, the deed should be null and void and the rights conveyed thereby should revert to the grantors, title to the easement reverted to the grantors when no driveway had been built and maintained for seventeen years after the original conveyance, and subsequent conveyances of the easement by deed constituted color of title to the easement. *Higdon v. Davis*, 640.

§ 19. Period Necessary to Ripen Title

The doctrine of color of title is applicable to acquisition of title to an easement by prescription so that one can acquire a prescriptive easement by adverse use for seven years under color of title. *Higdon v. Davis*, 640.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

The defenses of laches and equitable estoppel could not be raised for the first time on appeal. *Wake County ex rel. Denning v. Ferrell*, 185.

§ 6.1. Form of Decision as Affecting Appealability

An order denying defendant's motion to dismiss for plaintiff's failure to obtain proper service of process was not immediately appealable. *Updike v. Day*, 636.

§ 6.2. Finality as Bearing on Appealability

Plaintiff's cross-appeal of a summary judgment against one of several defendants, taken after the remaining defendants had appealed from a jury verdict, should not have been dismissed. *Ingle v. Allen*, 20.

Even if an interlocutory order affected a substantial right so that plaintiff children could have immediately appealed, the children did not lose their right to appeal from the final judgment by choosing not to appeal immediately. *Azzolino v. Dingfelder*, 289.

Defendants had no right to appeal an order granting a preliminary injunction. *Hopper v. Mason*, 448.

Dismissal of plaintiff's claims against fewer than all defendants and the award of attorneys' fees to the dismissed defendants was substantially equivalent to a partial summary judgment for a monetary sum and was appealable. *Miller v. Henderson*, 366.

An order granting summary judgment on the issue of liability, reserving the issue of damages for trial, and granting a permanent injunction was not immediately appealable but was heard by the Court of Appeals in its discretion. *Smith v. Watson*, 351.

The trial court's interlocutory order in a child custody and support action requiring the parties and the child to submit to blood tests did not affect a substan-

APPEAL AND ERROR — Continued

tial right and was not immediately appealable even though plaintiff contended that the paternity issue was *res judicata*. *Asad v. Asad*, 807.

An order granting summary judgment on plaintiff vendors' claim for cancellation of a notice of the purchasers' interest was interlocutory where defendant purchasers' counterclaim for monies paid to plaintiffs remained to be adjudicated. *Falcone v. Juda*, 790.

In an action arising from the transfer of real property, an order of partial summary judgment placing title was immediately appealable where each of the remaining claims was dependent on the determination of title. *Johnson v. Brown*, 660.

§ 11. Stipulations of Parties

An excess insurer which did not make a motion to dismiss and which signed a stipulation that it had been properly served and joined could not argue that the insured could not bring an action against it or that interest against it could not run under the terms of the policy until a final mandate from the Appellate Division. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

§ 19. Appeals in Forma Pauperis

Although the record on appeal does not contain an affidavit of indigency or a certificate of counsel, it will be presumed that the trial court acted upon valid filings in its order allowing a civil pauper appeal. *Dobbins v. Paul*, 113.

§ 20. Appellate Review of Nonappealable Interlocutory Orders by Certiorari

An interlocutory appeal was treated as a petition for certiorari and granted in the interest of justice. *Amey v. Amey*, 76.

§ 24. Necessity for Objections

An excess insurer could not contend on appeal that the insured had not satisfied a condition that it maintain \$300,000 of primary coverage because of a \$50,000 deductible in the primary policy because of its failure to object to a finding of fact in the final judgment, admissions and allegations in its answer, stipulations, and its knowledge of the primary insurance policy. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

§ 28.2. Necessity for Evidence to Support Findings of Fact

Where no findings of fact were made in the trial court's denial of plaintiff's Rule 60(b) motion, the question on appeal becomes whether there was evidence from which the court could have made sufficient findings of fact. *Vaglio v. Town and Campus Int., Inc.*, 250.

ARCHITECTS

§ 2. Fees

Defendant's motion for a directed verdict was properly denied in an action to recover architect's fees withheld under a contract clause requiring reimbursement of advances paid by the original developer. *Kabatnik v. Westminster Co.*, 758.

In an action to recover architect's fees, the court correctly instructed the jury on the rights of defendant in regard to an earlier developer's testimony. *Ibid.*

ARREST AND BAIL

§ 3.1. Requirement of Probable Cause for Warrantless Arrest

Defendant's warrantless arrest was lawful where the arresting officers had probable cause to believe that defendant had committed a felony or misdemeanor

ARREST AND BAIL — Continued

and would flee before he could be apprehended if a warrant was first obtained. *S. v. Wester*, 321.

§ 3.6. Legality of Warrantless Arrest for Robbery

Officers had probable cause to arrest defendant for certain armed robberies based on an accomplice's confession implicating defendant, the fact that defendant appeared to be about to check out of a motel constituted "exigent circumstances" which excused a warrantless entry by officers into defendant's motel room and their warrantless arrest of defendant, and a photographic identification of defendant by use of a photograph taken after his arrest should not be suppressed as a product of an illegal arrest. *S. v. Wallace*, 681.

ASSAULT AND BATTERY**§ 11.3. Indictment for Assault on Officer in Performance of his Duties**

An indictment for the felony offense of assault with a firearm on a law enforcement officer performing a duty of his office need not allege the particular duty the officer was performing. *S. v. Bethea*, 125.

§ 13. Competency of Evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, testimony that the victim could not return to work until a week later due to his injuries could have had a stronger foundation, but taken as a whole did not prejudice defendant. *S. v. Wester*, 321.

There was no error in allowing a rescue worker to refer to the "cutting victim" where it was not contested that there had been a serious attack with gory results. *Ibid.*

§ 14.3. Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury; Sufficiency of Evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the evidence of serious injury was sufficient to survive defendant's motions for dismissal and a directed verdict. *S. v. Wester*, 321.

§ 15.7. Instruction on Self-Defense Not Required

Evidence tending to show that the victim had earlier assaulted defendant did not require the trial court to instruct on self-defense in a prosecution for assault with a deadly weapon. *S. v. Hunter*, 602.

§ 16.1. Submission of Lesser Degrees of Crime Not Required

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the court did not err by not instructing the jury on the lesser included offenses of misdemeanor assault with a deadly weapon, simple assault, and affray. *S. v. Wester*, 321.

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the court did not err by refusing to explain the difference between felony and misdemeanor assault related crimes since misdemeanor assault related crimes did not arise on the evidence. *Ibid.*

The evidence in a prosecution for assault with a three-inch lock blade knife was not conflicting as to the deadly character of the weapon so as to require the trial court to submit simple assault. *S. v. Hunter*, 602.

ATTORNEYS AT LAW

§ 3.1. Nature and Extent of Attorney's Authority

Sellers were bound by their attorney's parol agreement, made within the scope of his authority, as to the description of the property to be placed in the deed conveying the property to the buyers even though the parol agreement modified the written agreement between the parties. *Biggers v. Evangelist*, 35.

§ 3.2. Termination of Authority

Where notice that plaintiff would move to have defendant held in contempt was served on defendant's attorney of record and the attorney subsequently notified the Clerk of Court that he did not represent defendant, defendant's notice was sufficient because there was nothing to show the attorney had been relieved before the notice was served. *Bennett v. Bennett*, 424.

§ 5.1. Liability for Malpractice

Summary judgment was properly granted for defendant attorney in an action for negligence arising from the administration of an estate and testamentary trust. *Ingle v. Allen*, 20.

§ 6. Withdrawal of Attorney from Case

Defendant was prejudiced when the trial court permitted her counsel to withdraw on the trial date without prior notice to her and set the trial for only two days later. *Williams and Michael v. Kennamer*, 215.

§ 7.5. Allowance of Fees as Part of Costs

The court did not abuse its discretion in granting attorneys' fees under 42 U.S.C. 1988 where claims against defendants were dismissed for failure to state a claim upon which relief could be granted. *Miller v. Henderson*, 366.

AUTOMOBILES AND OTHER VEHICLES

§ 2.4. Revocation of License; Proceedings Related to Drunk Driving

Plaintiff's license was properly revoked for willful refusal to submit to a breathalyzer test where plaintiff refused to submit to the test until some 20 minutes after the 30-minute time limit for taking the test had expired. *Mathis v. Division of Motor Vehicles*, 413.

§ 11.3. Parking; Proximate Cause

Plaintiff's evidence was insufficient to show that negligence by defendant who had stopped in front of a stalled vehicle was a proximate cause of plaintiff's injury. *Cutchin v. Pledger*, 279.

§ 45. Relevancy and Competency of Evidence Generally

In an action for damages arising from an automobile collision, there was no error in the admission of a witness's opinion as to the value of plaintiff's automobile before and after the collision. *Sexton v. Barber*, 175.

§ 114. Assault and Homicide; Instructions Generally

The trial court in a prosecution for involuntary manslaughter erred in refusing to instruct the jury on the lesser included offense of death by a vehicle under former G.S. 20-141.4(a). *S. v. Lackey*, 581.

§ 127.1. Sufficiency of Evidence of Driving Under the Influence; Particular Cases

The State's evidence was sufficient to support conviction of defendant for driving under the influence of alcohol. *S. v. Scott*, 570.

AUTOMOBILES AND OTHER VEHICLES — Continued**§ 131.1. Sufficiency of Evidence of Hit and Run**

In a prosecution for hit and run and failing to stop at a stop sign, the trial court properly denied defendant's motion for appropriate relief based on insufficient evidence. *S. v. Acklin*, 261.

BASTARDS**§ 10. Civil Action by Illegitimate Child to Compel Father to Furnish Support**

The trial court had the discretion to tax the costs of a blood test to defendant in an action brought by a county for a determination of the paternity of a child and for the recovery of AFDC funds previously paid for support of the child. *Wake County ex rel. Denning v. Ferrell*, 185.

In an action against defendant father to recover monies paid under an Aid For Dependent Children Program, the State is entitled to recover for public assistance paid before service of a summons and complaint, before defendant had knowledge of the birth of his child, and before demand was made upon him to support the child. *State ex rel. Terry v. Marrow*, 170.

BILLS AND NOTES**§ 19. Action on Note; Competency of Parol Evidence**

Testimony by one of the makers of a note that money was advanced by plaintiff as a gift and that the note was given to plaintiff for tax purposes with no intention that it be repaid was not barred by the parol evidence rule. *Garrison v. Garrison*, 618.

BURGLARY AND UNLAWFUL BREAKINGS**§ 5. Sufficiency of Evidence Generally**

The State's evidence was sufficient to permit inferences of an attempt to enter and an intent to commit larceny so as to support defendant's conviction of attempted first degree burglary. *S. v. Goodman*, 343.

§ 5.6. Sufficiency of Evidence of Breaking or Entering where Target Felony is Thwarted

The State's evidence was sufficient for the jury to infer an intent to commit larceny so as to support defendant's conviction of felonious breaking and entering of a motor vehicle. *S. v. Goodman*, 343.

§ 8. Sentence and Punishment

In the absence of aggravating or mitigating factors, the trial court was required to impose the presumptive term of 15 years for first degree burglary. *S. v. Goodman*, 343.

CANCELLATION AND RESCISSION OF INSTRUMENTS**§ 10.3. Sufficiency of Evidence of Mutual Mistake**

The evidence presented a jury question as to mutual mistake of fact in an action for specific performance of a contract for the sale of land. *Graham v. Morrison*, 743.

COMPROMISE AND SETTLEMENT

§ 5. Admissibility of Evidence

In an action to establish a prescriptive easement over an old logging road, the trial court erred by not striking a portion of the testimony of plaintiffs' surveyor concerning settlement negotiations. *Dotson v. Payne*, 691.

CONSPIRACY

§ 6. Sufficiency of Evidence

There was sufficient evidence to take a charge of conspiracy to traffic in cocaine to the jury where there was direct evidence of conversations between defendant and an accomplice regarding a sale, direct evidence of arrangements to sell cocaine, and personal participation by defendant in a scheme to deliver cocaine. *S. v. Baize*, 521.

CONSTITUTIONAL LAW

§ 20. Equal Protection Generally

Summary judgment was properly granted for defendant Town because plaintiffs did not show actual discrimination or unreasonable classification in the exemption of churches from parking provisions. *Goforth Properties, Inc. v. Town of Chapel Hill*, 771.

§ 23.3. Scope of Protection of Due Process; Taxation

A complaint challenging a property tax assessment for violations of due process and equal protection was properly dismissed because North Carolina's property tax statutes provide a "plain, adequate and complete" remedy. *Johnston v. Gaston County*, 707.

§ 28. Due Process Generally in Criminal Proceedings

An officer's accidental discharge of his revolver while chasing the fleeing defendant did not constitute a flagrant violation of defendant's constitutional rights requiring a dismissal of a narcotics charge against defendant. *S. v. Williams*, 136.

§ 30. Discovery

The trial court did not err in failing to conduct an *in camera* examination of the prosecution's file to determine whether the file contained a prior inconsistent statement by a State's witness to the police which defense counsel allegedly had seen in the file. *S. v. Ray*, 165.

The trial court did not err in denying defendant's motion for an *in camera* inspection of a police report discovered during examination of a law officer. *S. v. Williams*, 136.

§ 48. Effective Assistance of Counsel

Failure of defendant's trial counsel to submit a request for jury instructions on fingerprints was not ineffective assistance of counsel. *S. v. Reilly*, 1.

Defendant was not denied the effective assistance of counsel because counsel failed to object to the court's exclusion of testimony by a defense witness or because counsel failed to renew his motion to dismiss at the close of all the evidence. *S. v. Dorsey*, 435.

Defendant did not have reasonably effective assistance of counsel where defense counsel failed to interview potential witnesses prior to trial, failed to take timely steps to bring them to court, and interviewed defense witnesses in court within the hearing of the prosecutor. *S. v. McEntire*, 720.

CONSTITUTIONAL LAW — Continued**§ 67. Identity of Informants**

In a prosecution for possession of marijuana with intent to sell and deliver, the trial court did not err in denying defendant's motion for the disclosure of the name of a confidential informant. *S. v. Williams*, 136.

§ 79. Sentences within Maximum Fixed by Statutes

A defendant in a prosecution for trafficking in marijuana could not contend that the minimum mandatory sentence was significantly disproportionate to the crime and therefore cruel and unusual punishment because he entered a plea of guilty. *S. v. Ford*, 748.

CONTEMPT OF COURT**§ 5.1. Sufficiency of Notice and Show Cause Order**

Where defendant was found in contempt at a hearing on 19 July 1983, the statutory requirement of a show cause order was satisfied by an order issued on 25 January 1982 which had never been acted upon. *Bennett v. Bennett*, 424.

§ 6.3. Findings and Judgment

A finding that defendant was capable of making child support payments was sufficient to support an order of contempt where a court did not state that it was finding defendant in civil contempt but punished him as if he were. *Bennett v. Bennett*, 424.

§ 7. Punishment for Contempt

Where the court found defendant in civil contempt, there was no error in sentencing him to imprisonment for 180 days or until he complied with the court's order. *Bennett v. Bennett*, 424.

Where a defendant was held in contempt and incarcerated for failing to make child support payments, the court erred by requiring defendant to make payments which were not yet due in order to obtain his release. *Ibid*.

Where defendant corporation did not obey a mandatory preliminary injunction, the court had the authority to order that defendant's general manager be imprisoned and fined. *State ex rel. Grimsley v. West Lake Dev., Inc.*, 779.

§ 8. Appeal and Review

Defendant could not present the defense of inability to comply after it stipulated at trial to a finding that it had failed to install erosion control devices in willful disregard of a court order and did not except to that finding on appeal. *State ex rel. Grimsley v. West Lake Dev., Inc.*, 779.

CONTRACTS**§ 29.2. Calculation of Compensatory Damages**

In an action arising from a drainage problem in a newly built house, there was ample competent evidence to support the trial court's finding of the reasonable costs of correcting the problem. *Coble v. Richardson Corp.*, 511.

CORPORATIONS**§ 27.2. Liability of Corporation for Torts**

Defendant corporation was liable under the doctrine of *respondeat superior* for the negligence of defendant physician in the performance of his duties at a clinic operated by the corporate defendant. *Azzolino v. Dingfelder*, 289.

COSTS

§ 4. Items of Costs in General

Where the judgment of the trial court taxed the costs to plaintiffs, the plaintiffs must pay the surveyor's fees although no specific award of such fees was included in the judgment. *Higdon v. Davis*, 640.

COUNTIES

§ 2.1. Governmental Powers; Regulation of Collection of Garbage

A Cabarrus County ordinance prohibiting the charging of fees to Cabarrus County residents and franchise haulers for the use of any sanitary landfill in Cabarrus County did not apply to the City of Charlotte and was improper because it based fees upon residence rather than kind and degree of service. *Cabarrus County v. City of Charlotte*, 192.

COURTS

§ 4. Minimum Amount within Original Jurisdiction of Superior Court

The district court erred in denying defendant's motion to transfer to superior court where defendant's answer alleged an amount in controversy in excess of \$10,000. *Amey v. Amey*, 76.

§ 7.1. Nature and Scope of Superior Court's Jurisdiction

Where a finding of no double jeopardy is appealed from district to superior court, the scope of review in superior court is a *de novo* evidentiary hearing on double jeopardy, and not a trial on the merits. *S. v. Gurganus*, 96.

§ 14.1. Transfer of Causes

Defendant waived her right to have her motion to transfer heard by a superior court judge where she objected to the proceedings in district court only in her brief on appeal. *Amey v. Amey*, 76.

The district court erred by granting plaintiff's motions to strike defendant's answer and to dismiss her counterclaims, and by reassigning the case to the magistrate, before ruling on defendant's prior motion to transfer. *Ibid.*

CRIMINAL LAW

§ 6. Mental Capacity as Affected by Intoxicating Liquor

There was no error in the court's failure to instruct on voluntary intoxication where the evidence did not support a finding that intoxication precluded defendant from having the ability to form the specific intent to commit the offenses charged. *S. v. Washington*, 767.

§ 22. Arraignment Generally

Defendant's motion for arrest of judgment for failure of the court to formally arraign him or to have him sign a written waiver was properly denied where defendant was not prejudiced by the lack of a formal arraignment. *S. v. Wester*, 321.

§ 46. Flight of Defendant as Implied Admission

The trial court did not err in refusing to give an instruction as to the mere fact of fleeing from a detective. *S. v. Williams*, 136.

CRIMINAL LAW — Continued**§ 50.1. Admissibility of Opinion Testimony**

A robbery victim's testimony that the gun used by defendant was "one that would kill me if I didn't do what he said" was admissible as an instantaneous conclusion of the mind. *S. v. Wallace*, 681.

§ 50.2. Opinion of Nonexpert

The training completed by a rescue squad member made him better qualified than the jury to form an opinion on the victim's medical condition. *S. v. Wester*, 321.

§ 60.5. Sufficiency of Fingerprint Evidence

The State's fingerprint evidence was sufficient to support conviction of defendant for breaking or entering of a restaurant and larceny of property therefrom. *S. v. Reilly*, 1.

The trial court did not commit plain error in failing to give an unrequested special instruction on fingerprint evidence. *Ibid*.

§ 66.5. Right to Counsel at Lineup

There was no prejudice from defendant's participation in a pretrial lineup without counsel where the witness could not make a pretrial or in-court identification and where defendant was detained only as a suspect. *S. v. Gilliam*, 83.

§ 66.9. Suggestiveness of Photographic Identification Procedure

There was no error in the denial of defendant's motion to suppress pretrial photographic identifications where the photographic lineup was not so unnecessarily suggestive as to constitute a denial of due process. *S. v. Fields*, 235.

A pretrial identification procedure in which a robbery victim identified defendant from a photograph of a lineup was not impermissibly suggestive. *S. v. Wallace*, 681.

A photographic identification procedure was not impermissibly suggestive because the number tag shown in the photograph of defendant was a police identification sign with a case number on it while handwritten number tags were used in the other photographs. *Ibid*.

Pretrial photographic procedures were not impermissibly suggestive because defendant was the only person who appeared both in a photograph of a lineup and in individual photographs shown to a robbery victim. *Ibid*.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

There was no error in the denial of defendant's motion to suppress in-court identifications where the witnesses' in-court identifications were of independent origin and did not result from any pretrial photographic identification procedures. *S. v. Fields*, 235.

A robbery victim's in-court identification of defendant was of independent origin and not tainted by pretrial photographic identification procedures. *S. v. Wallace*, 681.

§ 70. Tape Recordings

The court did not err by admitting tape recordings of conversations between defendant and an S.B.I. agent. *S. v. Hudson*, 389.

CRIMINAL LAW — Continued**§ 71. Shorthand Statements of Fact**

A deputy's testimony that he had referred to "a felony [that] had occurred" when questioning defendant was admissible as a shorthand statement of fact. *S. v. Wester*, 321.

§ 73.4. Hearsay; Statement as Part of Res Gestae

There was no error in admitting statements made to others by defendant after being asked what had happened by the investigating officer. *S. v. Southern*, 563.

§ 74.3. When Confession of Codefendant Is Competent

Defendant's right of confrontation was not violated by the admission of a non-testifying codefendant's sanitized confession, and defendant waived his right to protest the admissibility of a second codefendant's sanitized confession by failing to object thereto at the trial. *S. v. Johnson*, 90.

§ 78. Stipulations

Defendant's stipulation that he had been convicted of breaking into coin-operated machines on three earlier occasions was not ineffective because it was made immediately before the trial began and not "after commencement of the trial and before the close of the State's case" as provided in G.S. 15A-928. *S. v. Ford*, 452.

§ 80.1. Authentication of Records

There was no error in admitting a transcript of a prior police interview with an accomplice where the transcript had never been formally authenticated and where the court did not give an instruction on its limited corroborative purpose prior to the reading of the transcript. *S. v. Baize*, 521.

§ 85. When Character Evidence Relating to Defendant Is Admissible

In a prosecution for second degree murder, the trial court erred by admitting evidence elicited by the State that defendant had a reputation for shooting people when defendant had neither testified nor offered evidence of his good character. *S. v. Slade*, 212.

§ 85.1. Defendant's Character Evidence

Defendant cannot complain that testimony of his good character was excluded where his counsel asked whether he had been "arrested, tried, or convicted of anything," did not rephrase his question when given the opportunity to do so, and did not include in the record what his answer would have been. *S. v. Gilchrist*, 180.

§ 87.4. Redirect Examination

The court did not err in allowing an officer to testify concerning the statements of others about "Freddie" because defendant had already elicited testimony on the subject. *S. v. Gilchrist*, 180.

§ 89.2. Corroboration

The trial court did not abuse its discretion in permitting the State to corroborate a credit card owner's testimony by introducing a summary of charges to her account which showed unauthorized transactions in addition to the ones at issue. *S. v. Ray*, 165.

There was no error in admitting a transcript of a prior police interview to corroborate an accomplice's testimony where the officer who asked the questions in the interview was not the officer who read the transcript in court. *S. v. Baize*, 521.

CRIMINAL LAW — Continued**§ 89.5. Slight Variances in Corroborating Testimony**

Transcripts of two police interviews with an accomplice were properly admitted for the purpose of corroborating the accomplice's testimony despite minor variations. *S. v. Baize*, 521.

§ 89.6. Impeachment

The trial court properly allowed the State to impeach the credibility of alibi witnesses by cross-examination of the witnesses concerning their religious beliefs and affiliations. *S. v. Reilly*, 1.

§ 90. Rule that Party May Not Discredit his own Witness

The State was not permitted to impeach its own witnesses when the prosecutor asked the witnesses about prior written statements they had made. *S. v. Scott*, 570.

§ 90.2. When Cross-Examination of own Witness May Be Permitted

There was no prejudice from the court's failure to conduct a *voir dire* before allowing the State to impeach its own witness where the State was clearly surprised by testimony favorable to defendant. However, it is strongly emphasized that the trial courts should follow the proper procedure. *S. v. Gilliam*, 83.

§ 91. Speedy Trial

There was no error in the denial of defendant's motion to dismiss for violation of the Speedy Trial Act where continuances were granted to the State because "the trial of other cases prevented the trial of this case during this session." *S. v. Washington*, 767.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

In a prosecution for possession of cocaine with intent to sell and deliver, defendant's motions to dismiss were properly denied where there was evidence from which the jury could find defendant guilty. *S. v. Hudson*, 389.

§ 112.6. Instructions on Self-Defense

There was no plain error where the trial judge misstated the law of self-defense in instructing the jury but correctly stated the law in the conclusion to his initial instruction and in the final summary. *S. v. Southern*, 563.

§ 113.1. Recapitulation or Summary of Evidence

The court did not err by not summarizing and recapitulating the evidence where the record shows no oral request or tender of a special instruction, the defendant had the opportunity to request such an instruction, the instructions given applied the law to the facts, and the final mandate complied with the statute. *S. v. Wester*, 321.

§ 113.3. Charge on Subordinate Feature of Case; Request for Special Instructions Required

The court did not err by not instructing the jury on defendant's failure to offer evidence where defendant did not make a written request for a special instruction, and the subject was covered in the charge concerning defendant's failure to testify. *S. v. Wester*, 321.

§ 117.4. Charge on Credibility of Accomplices

There was no error when the trial court gave a special scrutiny instruction to the jury regarding an accomplice's testimony only after she had presented damaging evidence. *S. v. Baize*, 521.

CRIMINAL LAW — Continued**§ 122.1. Jury's Request for Additional Instructions**

The trial court did not abuse its discretion by refusing to allow the testimony of two witnesses to be read to the jury as requested by the jury during deliberations. *S. v. Gilliam*, 83.

There was no abuse of discretion in a trial judge's refusal to reinstruct the jury on self-defense because the jury had requested additional instructions only on malice. *S. v. Southern*, 563.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

A new trial was in order where the jury deliberated for five hours, reported a wide numerical split and difficulty in being unanimous, and returned with a split, inconsistent verdict 24 minutes after further instructions. *S. v. McEntire*, 720.

§ 124.1. Ambiguity of Verdict

The verdict of "possession with intent to sell or deliver" cocaine was inherently ambiguous and did not support the judgment. *S. v. Hudson*, 389.

§ 126.3. Acceptance of Verdict

The requirement that verdicts be returned by the jury in open court was not violated when the trial judge received the verdict sheet from the foreman at the door of the jury room, returned to the courtroom with the jury, read the verdict sheet aloud to them, and asked if that was their verdict. *S. v. Staley*, 286.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

There was no abuse of discretion in the trial court's denial of defendant's motion for appropriate relief on the grounds that the verdict was contrary to the weight of the evidence. *S. v. Acklin*, 261.

§ 138. Severity of Sentence

The evidence supported the court's finding as a factor in aggravation that a felonious assault on a law officer was committed for the purpose of preventing a lawful arrest. *S. v. Bethea*, 125.

Evidence that defendant used a .30-.30 lever action rifle did not support a finding in aggravation that defendant employed a weapon normally hazardous to the lives of more than one person. *Ibid*.

The trial court did not err in refusing to find as a mitigating factor that defendant's mental condition significantly reduced his culpability for the offense. *Ibid*.

The trial court did not err in considering prior convictions in aggravation where defendant made no challenge to the admissibility of evidence of prior convictions. *S. v. Harris*, 141.

The trial court erred in finding as an aggravating factor that defendant induced a female who had no prior criminal record to participate in a kidnapping. *S. v. Brame*, 270.

Evidence that defendant indicated to the investigating officer "that he had been the driver of the black Ford" did not require the trial court to find as a mitigating factor for involuntary manslaughter that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. *S. v. Brewington*, 442.

Defendant was not prejudiced when the trial court referred to the "presumptive term" as the "minimum term" for first degree burglary. *S. v. Goodman*, 343.

The trial court properly found as an aggravating factor that defendant was armed with a deadly weapon at the time of a burglary. *S. v. Sweigart*, 383.

CRIMINAL LAW — Continued

The trial court did not err in failing to find as a mitigating factor that defendant acknowledged wrongdoing to a law officer at an early stage of the criminal process where defendant's confession came after an initial denial of wrongdoing and a subsequent confrontation by irrefutable evidence. *Ibid.*

The trial court did not err in failing to find as a mitigating factor that defendant's limited mental capacity significantly reduced his culpability for a burglary. *Ibid.*

Evidence that, upon hearing voices, defendant ran from a home which he burglarized and threw down the knife he was carrying did not require the court to find as a mitigating factor that defendant exercised caution to avoid serious bodily harm or fear. *Ibid.*

There was no error in the court's failure to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage where the only evidence that defendant acknowledged his participation did not show when he did so. *S. v. Lunsford*, 455.

Where defendant's original sentence was remanded and the record showed that the court considered defendant's post-sentence actions as factors in mitigation, there was no abuse of discretion in giving those factors little or no weight. *S. v. Stone*, 417.

Where defendant's sentence was remanded, there was no error on resentencing in failing to give credit for "gain time" earned between the first and second sentencing hearings. *Ibid.*

Where defendant was sentenced for two felony offenses, the court erred by failing to list aggravating and mitigating factors separately for each crime. *Ibid.*

The court did not err by finding as an aggravating factor that defendant had a prior criminal record based on a Police Information Network computer printout. *S. v. Wester*, 321.

There was sufficient evidence to find as an aggravating factor that the crime was especially heinous, atrocious, or cruel. *Ibid.*

The trial court erred in finding as a factor in aggravation of involuntary manslaughter that defendant had a blood alcohol content of .19 percent which was above that necessary for the underlying driving under the influence violation where the State relied on defendant's intoxication to show his criminal negligence. *S. v. Lackey*, 581.

The trial court should not have considered two convictions where prayer for judgment was continued in finding the aggravating factor of prior convictions. *S. v. Southern*, 563.

Where a defendant is sentenced to less than the presumptive term, he has no right to appeal the issue of whether his sentence is supported by the evidence introduced at trial. *S. v. Johnson*, 607.

The trial court was not required to find strong provocation as a mitigating factor for a felonious assault and a second-degree murder where there was evidence that defendant's wife told him she had moved out of their home because of an adulterous relationship and that she had her lover confirm the liaison by telephone. *S. v. Cameron*, 776.

Defendant's prevention of a jailbreak by other prisoners was not a mitigating factor which the trial court was required to find even if the evidence as to it was uncontradicted and credible. *Ibid.*

CRIMINAL LAW — Continued**§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered**

It was not error for the sentencing judge to hear testimony from defendant as a witness in another criminal case relating to charges against defendant which had been dismissed pursuant to a plea arrangement. *S. v. Sweigart*, 383.

§ 142.3. Particular Conditions of Probation Proper

The trial court properly ordered an indigent defendant to pay restitution to the State for the services of a public defender as a condition of probation without making an inquiry into defendant's ability to pay. *S. v. Hunter*, 602.

§ 142.4. Conditions of Probation Held Improper

The trial court erred in ordering defendant to pay restitution for the medical expenses of a felonious assault victim as a condition of probation without making findings as to defendant's ability to make restitution. *S. v. Hunter*, 602.

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

A defendant in a prosecution for trafficking in marijuana could not contend that the minimum mandatory sentence was significantly disproportionate to the crime because he entered a plea of guilty. *S. v. Ford*, 748.

§ 148.1. Judgments Appealable; Judgments Before or During Trial

The Fair Sentencing Act does not allow an appeal of a presumptive sentence as of right. *S. v. Dickey*, 225.

Where a superior court finding of no double jeopardy was remanded, it was noted that defendant had no right to appeal an interlocutory order denying his motion to dismiss for double jeopardy prior to being put on trial a second time, but that a judgment on double jeopardy adverse to the State could be immediately appealed. *S. v. Gurganus*, 96.

§ 163. Exceptions and Assignments of Error to Charge; Necessity of and Time for Making Exceptions and Objections

No motion to suspend the rules is required in order to raise the issue of plain error in the brief. *S. v. Reilly*, 1.

The trial court erred in failing to conduct a recorded jury instruction conference upon written motion by defendant. *S. v. Clark*, 55.

Defendant could not assign as error the failure of the trial court to instruct on a lesser included offense where defendant failed to object to the instructions and submitted no proposed instructions prior to jury deliberations as required by App. Rule 10(b)(2). Furthermore, failure of the trial court to submit the lesser offense did not constitute plain error. *S. v. Goodman*, 343.

§ 171. Error Relating to One Count or One Degree of Crime Charged

A conviction for trafficking by possession of cocaine was reduced on appeal to the lesser included offense of felonious possession where there was insufficient evidence that defendant possessed one of two packages needed to make up the statutory amount for trafficking, but sufficient evidence that defendant possessed the other package. *S. v. Baize*, 521.

§ 181. Postconviction Hearing

The sufficiency of the State's evidence may be raised for the first time in a motion for appropriate relief. *S. v. Acklin*, 261.

DAMAGES**§ 12.1. Pleading Punitive Damages**

Plaintiffs' complaint in actions for wrongful life and wrongful birth failed to state a claim for punitive damages. *Azzolino v. Dingfelder*, 289.

DECLARATORY JUDGMENT ACT**§ 4. Availability of Remedy in Particular Controversies**

An action for a declaratory judgment is appropriate to interpret written instruments and there is no bar to granting a summary judgment in a declaratory judgment action. *LDDC, Inc. v. Pressley*, 431.

DEEDS**§ 8.1. Sufficiency of Consideration**

The bare assertions of two grantors that they did not receive money was insufficient to rebut the presumption of consideration arising from a recitation in the deed; furthermore, a promise in the deed by the grantees to construct and maintain an all weather driveway in the right-of-way constituted sufficient consideration for the deed so that it was not a deed of gift. *Higdon v. Davis*, 640.

§ 11.2. Effect of other Instruments

A contract for the sale of realty did not merge into the deed. *Biggers v. Evangelist*, 35.

§ 15.1. Defeasible Fees

Where a deed conveying a driveway easement required the grantee and his assigns to maintain an all weather driveway over the right-of-way conveyed and provided that, if they failed to do so, the deed should be null and void and the rights conveyed thereby should revert to the grantors, title to the easement reverted to the grantors when no driveway had been built and maintained for seventeen years after the original conveyance, and subsequent conveyances of the easement by deed constituted color of title to the easement. *Higdon v. Davis*, 640.

§ 19.3. Real Covenants

An Assignment of Pier Rights can either be considered a covenant running with the land or an agreement between tenants in common giving one tenant in common the right to exclusive use of part of the property. *Smith v. Watson*, 351.

DESCENT AND DISTRIBUTION**§ 8. Bastards**

An illegitimate child may inherit through intestate succession from the estate of a father who acknowledged paternity of the child by pleading guilty in a criminal bastardy action. *Sanders v. Brantley*, 797.

DIVORCE AND ALIMONY**§ 7. Grounds for Divorce from Bed and Board Generally**

The court's determination that plaintiff was not a dependent spouse and thus was not entitled to alimony did not terminate plaintiff's action for divorce from bed and board. *Long v. Long*, 405.

DIVORCE AND ALIMONY – Continued**§ 16. Alimony Without Divorce Generally**

Where the grounds asserted for alimony are asserted simultaneously as grounds for divorce, the correct procedure is to allow the jury to render its verdict on the "fault" issues of divorce and then to move to a bench hearing on dependency and the proper amount of alimony. *Long v. Long*, 405.

§ 16.6. Alimony without Divorce; Sufficiency of Evidence

The trial court erred in finding that no evidence of defendant's expenses and income for 1983 was presented. *Long v. Long*, 405.

§ 16.9. Alimony without Divorce; Amount and Manner of Payment

The trial court improperly ordered conveyance to the defendant wife of an interest in the marital home and other real estate where none of the considerations given in the judgment indicated that the judge feared that alimony payments would not be made. *Gilbert v. Gilbert*, 160.

§ 21.6. Enforcement of Alimony Awards; Effect of Separation Agreements

Where defendant did not file an answer or appear at the granting of a divorce, the inclusion of the deed of separation in the judgment was an issue to be determined by the court. *Ferree v. Ferree*, 737.

Where a separation agreement had been adopted in a judgment for divorce, a later court erred in finding that there was an adequate remedy at law for specific performance and that defendant was entitled to a jury trial on mutual mistake of fact. *Ibid*.

§ 24.8. Child Support; Where Changed Circumstances Are not Shown

The trial court's conclusion that a substantial change of circumstances justified a decrease in the father's child support obligation was not supported by the evidence and findings. *Massey v. Massey*, 753.

§ 29. Validity of Attack on Domestic Decrees

Plaintiff's action for annulment based on allegations that defendant's divorce from her husband was fraudulently obtained was properly dismissed where plaintiff lacked standing to collaterally attack the judgment. *Heiser v. Heiser*, 223.

§ 30. Equitable Distribution

An equitable distribution order awarding sole ownership of the marital home to plaintiff husband must be vacated where some of the court's findings were improperly based on marital fault and other findings involved matters which G.S. 50-20 expressly excludes from consideration in determining such distribution. *Smith v. Smith*, 242.

Findings as to the need of a parent with custody to own the marital residence and as to contributions made by the husband for the wife to obtain an advanced college degree were appropriate for consideration in determining the distribution of marital property. *Ibid*.

The court lacked authority to grant plaintiff's motions to strike and dismiss defendant's counterclaim for equitable distribution where the record contained no judgment of absolute divorce. *Lofton v. Lofton*, 635.

EASEMENTS

§ 4.3. Creation by Agreements; Construction and Effect of Agreement

A clause in a contract for the sale of realty gave the sellers the power expressly to reserve rights-of-way in two roads but did not invalidate the sellers' conveyance in the deed of their easements in the two roads or entitle the sellers to seek rights-of-way in the roads after the conveyance. *Biggers v. Evangelist*, 35.

§ 5.3. Creation of Easements by Implication; Sufficiency of Evidence

Plaintiffs established a right to an implied easement in two roads for access to and from two retained tracts but failed to establish implied easements in either of the roads for two other tracts. *Biggers v. Evangelist*, 35.

§ 6. Creation of Easements by Prescription

The doctrine of color of title is applicable to acquisition of title to an easement by prescription so that one can acquire a prescriptive easement by adverse use for seven years under color of title. *Higdon v. Davis*, 640.

§ 6.1. Sufficiency of Evidence of Creation of Prescriptive Easement

Where an action seeks to establish by prescription easements for ingress and egress to plaintiffs' farm over two paths in separate locations, separate uses are required to establish title. *Warmack v. Cooke*, 548.

In an action to establish easements by prescription, plaintiffs' evidence of a hostile use was sufficient to go to the jury. *Ibid.*

In an action to establish easements by prescription, evidence of public use consisting of neighbors using the paths in passing to and from their own property will not defeat the claim of hostile and exclusive use. *Ibid.*

In an action to establish easements by prescription, plaintiffs' continuous use was not interrupted when the same person leased plaintiffs' and defendant's tracts or by the erection of an electric fence across the path. *Ibid.*

In an action to establish easements by prescription, the trial judge did not err in admitting evidence of kinship between the parties and of the use of the paths prior to defendant's acquisition of his property, or by refusing to charge the jury that the proper period for consideration for a prescriptive right was the 20 years next preceding the claim. *Ibid.*

In an action to establish a prescriptive easement over an old logging road, defendants' motions for a directed verdict and for judgment n.o.v. were properly denied on the issue of adverse use. *Dotson v. Payne*, 691.

Plaintiffs' evidence was sufficient for the jury to find that they had title to a driveway easement by adverse possession under color of title for seven years. *Higdon v. Davis*, 640.

§ 7.2. Instructions in Action to Establish Easement

The trial court erred in failing to submit a tendered issue as to which of two locations of an easement was the correct one. *Higdon v. Davis*, 640.

EJECTMENT

§ 1.3. Summary Ejectment; Pleading

In an action for summary ejectment, the district court erred in concluding that there was no genuine issue of title where defendant's answer specifically denied the existence of a lease and where the magistrate had transferred the matter because he found that the pleadings raised an issue of title. *Amey v. Amey*, 76.

EMINENT DOMAIN**§ 7.8. Judgments**

Defendant's filing of a voluntary dismissal without prejudice in a highway condemnation case when defendant's pleading contained no counterclaim, cross-claim or third-party claim constituted an acknowledgment that the amount of the Department of Transportation's deposit was adequate compensation for the land taken. *Dept. of Transportation v. Combs*, 372.

EQUITY**§ 2. Laches**

The defenses of laches and equitable estoppel could not be raised for the first time on appeal. *Wake County ex rel. Denning v. Ferrell*, 185.

ESCAPE**§ 8. Sufficiency of Evidence**

The State's evidence was insufficient to support defendant's conviction of escape from a county jail or an officer of such facility in violation of G.S. 14-256. *S. v. Brame*, 270.

ESTOPPEL**§ 6. Pleading on Estoppel**

The defenses of laches and equitable estoppel could not be raised for the first time on appeal. *Wake County ex rel. Denning v. Ferrell*, 185.

EVIDENCE**§ 11.5. Persons Disqualified by Dead Man's Statute**

In an action against the estate of a deceased cotenant to recover rents received from cotenant property, the lessee of the property was not "a person interested in the event" within the purview of the dead man's statute, and the lessee's affidavit was admissible in a summary judgment hearing. *Isenhour v. Icenhour*, 762.

§ 23. Competency of Allegations in Pleadings

In an action to recover architect's fees, the court did not err in admitting a pleading from a prior action between the architect and the original developer. *Kabatnik v. Westminster Co.*, 758.

§ 31. Best and Secondary Evidence Relating to Writings

In an action to establish a prescriptive easement over an old logging road, the court erred by admitting testimony concerning a 1938 agreement between all the landowners on the road where plaintiffs did not produce the original document. *Dotson v. Payne*, 691.

§ 32.2. Application of the Parol Evidence Rule

Oral representations regarding a drainage problem made by defendant's agents prior to and at closing were properly admitted despite a merger clause in the contract of sale because the statements did not vary, add to, or contradict the warranty in the contract. *Coble v. Richardson Corp.*, 511.

EVIDENCE — Continued**§ 32.4. Parol Evidence; Matters Relating to Consideration**

Testimony by one of the makers of a note that money was advanced by plaintiff as a gift and that the note was given to plaintiff for tax purposes with no intention that it be repaid was not barred by the parol evidence rule. *Garrison v. Garrison*, 618.

§ 34.6. Declarations as to Bodily Feeling; Hearsay

In an automobile accident case tried without a jury, a medical expert's opinion about plaintiff's pain had an adequate foundation and was admissible where the witness based his opinion on more than just the statements of plaintiff and plaintiff's statements to the witness were made for the purposes of diagnosis and treatment. *Sexton v. Barber*, 175.

§ 50.2. Medical Expert Testimony as to Cause of Injury

There was no error in the admission of the opinion of a medical expert as to plaintiff's disability when the expert did not distinguish plaintiff's preexisting condition. *Sexton v. Barber*, 175.

Statements made by plaintiff to a physician in the course of treatment and diagnosis were proper evidence upon which the physician could base his expert opinion as to the cause of plaintiff's injury. *Ross v. Young Supply Co.*, 532.

FRAUD**§ 3.2. Material Misrepresentation of Fact; Statement of Opinion**

Defendant jeweler's representation as to the value of a bracelet sold to plaintiff was a mere opinion and did not constitute actionable fraud. *Hall v. Kemp Jewelry*, 101.

§ 12. Sufficiency of Evidence

On a counterclaim for fraudulent misrepresentation in the sale of real property, the evidence was sufficient to withstand motions for a directed verdict, judgment n.o.v., and new trial. *NCNB v. Carter*, 118.

FRAUDS, STATUTE OF**§ 6.1. Cases where Statute of Frauds Is Inapplicable**

The Statute of Frauds does not apply to contracts to abrogate or abandon a contract to convey. *Johnson v. Brown*, 660.

GUARANTY**§ 2. Actions to Enforce Guaranty**

The trial court did not err in holding the guarantor of a lease liable where possession of the property had been transferred away from the original lessee, but no new lease was executed, and where plaintiff had agreed to reduce the lease payments. *Durham Shopping Center, Inc. v. ORCO, Inc. and Orgain v. Andrews*, 628.

Where defendant guaranteed an entire lease and the guaranty agreement provided for liability after plaintiff gave notice of intent to declare default, plaintiff had the right to sue on the entire lease once it became apparent that the principal would make no more payments. An action commenced within three years of the last payment and notice to defendant was within the statute of limitations. *Ibid.*

GUARANTY — Continued

In an action against a guarantor on a lease, the trial court's conclusion that plaintiff had not unreasonably delayed in demanding payment or in bringing suit was supported by findings that defendant was reminded many times of the arrearages and of his responsibility as a guarantor. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 9. Actions against Department of Transportation Generally

Where summons was not properly served on defendant Department of Transportation's registered process agent or the Attorney General in an action on a highway contract claim, plaintiff timely continued its action by obtaining an alias summons thirty-five days after issuance of the original summons although the alias summons was obtained after the six-month period for filing the action had expired. *Barrus Construction Co. v. N.C. Dept. of Transportation*, 700.

A highway construction contract did not require the Department of Transportation to grant an extension of the final completion date which was 180 days after the extended interim completion date but permitted unequal extensions for the interim and final completion dates. *Ibid.*

§ 11.1. Actions to Establish Neighborhood Public Roads

Defendants' motions for a directed verdict and judgment n.o.v. should have been granted on the issue of neighborhood public road where plaintiffs failed to establish that the roadway ever served a public use or that the portion of the roadway traversing the defendants' property was an established road or a properly established easement. *Dotson v. Payne*, 691.

HOMICIDE

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

There was sufficient evidence of second degree murder where defendant, a mature adult, intentionally struck a two and one-half year old child with a clenched fist as hard as one would hit an adult. *S. v. Huggins*, 63.

The State's evidence was sufficient to support defendant's conviction of second degree murder of his father-in-law. *S. v. Staley*, 286.

§ 21.8. Sufficiency of Guilt of Second Degree Murder where Defendant Pleads Self-Defense

Perfect self-defense was not established as a matter of law where defendant's evidence, taken as true, showed that he aggressively and willingly entered into the fight. *S. v. Deans*, 227.

§ 26. Instructions on Second Degree Murder

There was no error in the denial of defendant's motion to dismiss a second degree murder charge and instruct only on involuntary manslaughter based on imperfect self-defense. *S. v. Deans*, 227.

In a prosecution for second degree murder where there was no evidence of an affirmative defense, there was no error in the court's peremptory charge to the jury that there was no justification or excuse for defendant shooting the victim. *S. v. Johnson*, 607.

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

Defendant was not entitled to a jury instruction on involuntary manslaughter based on criminal negligence where defendant's own testimony showed that he struck a child intentionally. *S. v. Huggins*, 63.

HOMICIDE — Continued

In a prosecution for second degree murder, the trial court did not err in failing to submit involuntary manslaughter to the jury. *S. v. Johnson*, 607.

HOSPITALS**§ 5. Regulation of Nurses**

In a nursing malpractice action, directed verdict should not have been granted for defendant hospital where two expert witnesses testified that plaintiff's father died due to defendant's failure to meet the applicable standard of care. *Haney v. Alexander*, 731.

HUSBAND AND WIFE**§ 24. Alienation of Affections**

Actions for alienation of affections and criminal conversation are judicially abolished. *Cannon v. Miller*, 460.

INDICTMENT AND WARRANT**§ 9.7. Charging Offense Disjunctively**

An indictment which alleged possession with intent to sell or deliver cocaine, in the disjunctive, was incorrect, but defendant waived the defect by not moving to dismiss the indictment. *S. v. Hudson*, 389.

§ 11. Identification of Victim

There was no fatal variance between an indictment charging defendant with the murder of "Raleigh Edward Morte" and evidence that the victim's correct name was "Raleigh Edward Moretz." *S. v. Staley*, 286.

INFANTS**§ 3. Right of Infant to Recover for Torts**

An action for wrongful pregnancy is brought by the parents of a healthy but unplanned child, an action for wrongful birth is brought by the parents of an impaired child, and an action for wrongful life is brought by or on behalf of the impaired child. *Jackson v. Bumgardner*, 107.

§ 17. Delinquency Hearings; Confessions

In a delinquency proceeding for burning a school, there was sufficient evidence of corroborative circumstances clearly pointing to defendant juvenile where defendant's extrajudicial confessions contained details unknown to all but the arsonist. *In re Khork*, 151.

§ 18. Delinquency Hearings; Admissibility of Evidence

In an action in which defendant juvenile was adjudicated delinquent for setting fire to a school, a witness was properly qualified to testify as an expert in view of his extensive experience and practical training. *In re Khork*, 151.

Testimony by an S.B.I. agent that defendant would not meet the agent's eyes and had his heart in his throat when he was interviewed after the fire was admissible as a shorthand description of defendant's reaction to being questioned. *Ibid*.

INFANTS — Continued

§ 20. Delinquency Hearings; Judgments and Orders

Defendant's commitment to the division of youth services was not justified by the record of the dispositional hearing where there was no evidence of the inappropriateness of probation and no evidence to support an order of commitment. *In re Khork*, 151.

INSURANCE

§ 2.2. Liability of Agent to Insured for Failure to Procure Insurance

Summary judgment was properly entered for defendant insurance agents in an action to recover damages for an unfair trade practice and negligence in failing to inform plaintiff that insurance on the life of his wife might be "questionable" because of a requirement that all persons eligible for coverage work at least twenty hours per week in plaintiff's business. *Canady v. Hardin*, 156.

§ 6.1. Construction of Policies; Meaning of Words

In an action on a credit insurance policy, the trial court properly interpreted "gross loss covered, filed and proved," as meaning the debtor's entire indebtedness during the policy period, rather than the portion of the indebtedness protected by the policy, which could never exceed the policy amount. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

§ 6.2. Rule of Liberal Construction of Policy in Favor of Insured

A compulsory filing endorsement to a credit insurance policy was ambiguous and therefore properly interpreted against the insurer where the policy was 26 pages long, with 11 change endorsements, some of which supplemented sections of the primary policy and some of which replaced sections of the primary policy, and the filing endorsement did not expressly provide that it was intended as a substitute. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

§ 8. Waiver

A credit insurer waived a compulsory filing endorsement when it responded to an inquiry from plaintiff's subsidiary about bankruptcy filings by stating that no claim filing was necessary at that time. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

§ 57. Occupational Hazards

In an action to recover under a health insurance policy which excluded injuries arising from or in the course of employment, injuries which occurred when a ceiling fan fell on a covered dependent while he was sleeping in the back of his convenience store did not arise from and were not in the course of his employment. *Dayal v. Provident Life and Accident Ins. Co.*, 131.

§ 76. Automobile Fire Insurance Policies

Where defendant insurer did not receive plaintiff's renewal check for an automobile fire insurance policy until after the grace period had expired, defendant had a right not to renew the policy retroactively even though plaintiff may have placed his renewal check in the mail within the grace period. *Sawyer v. N.C. Farm Bureau Mut. Ins. Co.*, 803.

§ 79.1. Automobile Liability Insurance Rates; Approval by Commissioner of Insurance

The Commissioner of Insurance exceeded his statutory authority in extending a requested rate deviation for automobile liability insurance to "clean risks" ceded to the N.C. Reinsurance Facility. *Unigard Mut. Ins. Co. v. Ingram, Comr. of Insurance*, 725.

INSURANCE — Continued**§ 87.2 Automobile Liability Insurance; Proof of Permission to Use Vehicle**

A driver who obtained possession of an automobile from the owner by falsely representing that he had a valid driver's license was in "lawful possession" of the vehicle so that his operation of the vehicle was covered by the owner's liability policy. *Stanley v. Nationwide Mut. Ins. Co.*, 266.

§ 95.1. Cancellation of Compulsory Insurance; Notice to Insured

An "Expiration Notice" giving the insured an additional 16 day period beyond the termination date of an automobile liability policy in which he could pay the premium without an interruption in coverage was insufficient to permit defendant insurer to terminate the policy for nonpayment of premium. *Smith v. Nationwide Mut. Ins. Co.*, 69.

The "Premium Notice" and "Expiration Notice" mailed by an automobile liability insurer to the insured were not "manifestations of a willingness to renew" which were refused by the insured so as to eliminate the necessity for compliance with notice requirements in order for the insurer to refuse to renew the policy for nonpayment of premium. *Ibid.*

§ 149. General Liability Insurance

In an action to compel an insurance company to pay a judgment arising from a third party's use of plaintiff's product, defendant's motion for a Rule 12(b)(6) dismissal was properly granted where plaintiff had purchased "premises-operations" coverage and the injuries occurred away from plaintiff's premises and after physical possession of the product had been relinquished. *Lindley Chemical, Inc. v. Hartford Acci. and Indemn. Co.*, 400.

The court did not err in ordering that an insurer was not obligated on a judgment where the policy was for property damage and the judgment was in the nature of repair and cost of completion. *Hobson Construction Co. v. Great American Ins. Co.*, 586.

JUDGMENTS**§ 2. Time and Place of Rendition**

In an action for illegal alcohol sale and gambling violations, a superior court order finding no double jeopardy and remanding the case to district court was without authority and void where the ruling was made out of session. *S. v. Gurganus*, 96.

JURY**§ 7.14. Time of Exercising Peremptory Challenges**

The trial court erred in refusing to permit defendant to exercise a peremptory challenge to a juror who, after the jury was impaneled, informed the court that she had made an incorrect response on voir dire as to whether she knew any of the State's witnesses. *S. v. McLamb*, 220.

KIDNAPPING**§ 1.2. Sufficiency of Evidence**

The State's evidence was sufficient to support defendant's conviction of kidnapping a deputy sheriff for the purpose of holding him as a hostage. *S. v. Brame*, 270.

KIDNAPPING — Continued

§ 1.3. Instructions

The trial court did not err in refusing to give a requested instruction that the State had to prove that the restraint or removal was not an inherent feature of such other crime that was being committed. *S. v. Brame*, 270.

LANDLORD AND TENANT

§ 6.2. Use and Enjoyment of Premises

Plaintiff's implied covenant to quiet enjoyment or possession of leased premises was breached when she was constructively evicted by defendant lessors. *Dobbins v. Paul*, 113.

§ 13. Termination of Lease Generally

Plaintiff lessee's evidence showing a wrongful demand and notice to vacate the leased premises by the lessors followed by her immediate surrender of possession of the premises was sufficient to show a constructive eviction which supported her claim for damages under G.S. 42-25.9. *Dobbins v. Paul*, 113.

LARCENY

§ 7. Sufficiency of Evidence

Defendant's motion to dismiss was properly denied in a prosecution for credit card theft. *S. v. Fields*, 235.

§ 7.3. Sufficiency of Evidence of Ownership of Property

In a prosecution for felonious larceny of a horse in which defendant admitted taking the horse, there was at least an issue for the jury as to ownership of the property and a corresponding right to possession. *S. v. Snipes*, 206.

§ 7.4. Sufficiency of Evidence of Possession of Stolen Property

The State is entitled to the benefit of the doctrine of recent possession in a prosecution for credit card theft where the evidence gives rise to a logical and legitimate inference that defendant had possession of a stolen card and used it to activate a teller machine. *S. v. Fields*, 235.

§ 8. Instructions

The court erred by instructing the jury on receiving a stolen credit card where defendant was indicted for credit card theft, the evidence was of credit card theft, there was no evidence of receiving, and the jury returned a verdict of "guilty of credit card theft." *S. v. Fields*, 235.

LIMITATION OF ACTIONS

§ 4.6. Accrual of Cause of Action for Breach of Particular Contracts

The ten-year statute of limitations applicable to actions on sealed instruments applied where the word "seal" appeared in brackets next to the signatures of the parties. *Biggers v. Evangelist*, 35.

§ 8.2. Sufficiency of Notice of Facts Constituting Alleged Fraud

The question of whether defendants' claim of fraudulent misrepresentation was barred by the statute of limitations was properly submitted to the jury and the jury decision was not reversed on appeal. *NCNB v. Carter*, 118.

LIS PENDENS**§ 1. Generally**

A lis pendens indexed prior to sale results in a third party purchaser's title being dependent upon the determination of a trustee's title. *Johnson v. Brown*, 660.

MASTER AND SERVANT**§ 10. Duration and Termination**

Where plaintiffs' employment was terminable at will, defendant employer allowed plaintiffs to choose a layoff with the possibility of recall for one year rather than termination with severance pay, plaintiffs had no contractual right to recall, and defendant employer did not breach its employment contract with plaintiffs when it allegedly hired independent contractors and temporary workers rather than recall plaintiffs. *Smith v. Monsanto Co. and Johnson v. Monsanto Co.*, 632.

§ 10.2. Actions for Wrongful Discharge

Judgment on the pleadings for defendant in a retaliatory discharge action arising from a workers' compensation claim was appropriate where both the complaint and answer asserted that plaintiff had received permanent partial disability compensation. *Bridgers v. Whiteville Apparel Corp.*, 800.

§ 55.1. Workers' Compensation; What Constitutes "Accident"

An employee's "accident" leading to his death from chronic obstructive lung disease occurred when the employee's permanent partial disability due to chronic obstructive lung disease began rather than on the date he became totally disabled. *Joyner v. J. P. Stevens and Co.*, 625.

§ 55.4. Workers' Compensation; Relation of Injury to Employment

There was sufficient evidence for the Industrial Commission to find that plaintiff's husband was acting in the furtherance of his employer's business and to conclude that his death arose out of and in the course of his employment, where he died in a plane crash while returning from playing in a golf tournament in Florida. *Keziah v. Monarch Hosiery Mills*, 793.

§ 55.5. Workers' Compensation; Relation of Injury to Employment Particularly as to "Arising out of" the Employment

Plaintiff traveling salesman suffered an injury by accident arising out of and in the course of his employment when his leg was broken when his foot slipped on the frozen ground while he was getting into his wife's automobile at his own home in preparation to making sales calls on behalf of his employer. *Ross v. Young Supply Co.*, 532.

§ 55.6. Workers' Compensation; Relation of Injury to Employment Particularly as to "in the course of" the Employment

Injuries which occurred when a ceiling fan fell on plaintiff while he was sleeping in the back of his convenience store did not arise from and were not in the course of his employment. *Dayal v. Provident Life and Accident Ins. Co.*, 131.

§ 56. Workers' Compensation; Causal Relation between Employment and Injury

Plaintiff salesman's broken leg suffered when his foot slipped on the frozen ground as he attempted to enter an automobile in a different way than normal because the seat had been pushed forward was the result of a risk of his employment although plaintiff suffered from a disease which caused affected bones to be more fragile and subject to breaking. *Ross v. Young Supply Co.*, 532.

MASTER AND SERVANT – Continued**§ 58. Workers' Compensation; Compensable Injuries; Intoxication of Employee**

The Industrial Commission's finding that "it has not been proven that plaintiff's injuries were proximately caused by intoxication" was insufficient to resolve issues regarding the defense of intoxication raised by the evidence. *Anderson v. Century Data Systems*, 540.

There was no competent evidence in the record to raise an issue as to whether defendant employer provided intoxicants to plaintiff employee. *Ibid*.

§ 66. Workers' Compensation; Mental Disorders

There was sufficient competent evidence to support the Industrial Commission's finding that plaintiff had reached maximum medical improvement, even though one of plaintiff's doctors thought that he should see a psychologist or psychiatrist, because there was no direct evidence that plaintiff had psychological problems. *Haponski v. Constructor's, Inc.*, 786.

§ 68. Workers' Compensation; Occupational Diseases

An action to recover workers' compensation for chronic obstructive lung disease must be remanded for proper findings where it appeared that the Industrial Commission may have concluded that a ten percent physical impairment automatically translated into ten percent disability. *Armstrong v. Cone Mills Corp.*, 782.

§ 68.4. Workers' Compensation; Aggravation of Original Injury

The Industrial Commission's findings and conclusions that plaintiff's second fracture of the leg was the direct and natural result of his previous fracture was supported by testimony that the original fracture had not totally healed at the time of the second fracture. *Heatherly v. Montgomery Components, Inc.*, 377.

§ 69. Workers' Compensation; Amount of Recovery Generally

Where the Industrial Commission found that plaintiff had a 40% impairment of her lungs, that she was "permanently disabled in like degree," and that 30% of her 40% partial disability was work-related, the correct measure of damages would be 66⅔% of her average weekly wage multiplied by 30%. *Parrish v. Burlington Industries, Inc.*, 196.

Plaintiff was not barred from receiving further workers' compensation benefits because of her refusal to undergo a myelogram which the employer's doctor had recommended where the Industrial Commission had not ordered her to undergo a myelogram. *Perkins v. Broughton Hospital*, 275.

§ 69.1. Workers' Compensation; Meaning of "Incapacity" and "Disability"

The Industrial Commission should not have found that plaintiff was disabled in the same degree as her lung impairment where plaintiff's respiratory impairment was found to be 40% and AMA guidelines showed 50 to 70% as totally disabling a person for most types of employment. *Parrish v. Burlington Industries, Inc.*, 196.

The Industrial Commission's conclusion that plaintiff was temporarily totally disabled from the time his doctor certified that he could return to work under restrictions to the time he reinjured his leg was not supported by the Commission's findings. *Heatherly v. Montgomery Components, Inc.*, 377.

The Industrial Commission's finding that plaintiff was entitled to compensation for life for silicosis was supported by evidence from three physicians and by plaintiff's education and work history. *Allen v. Standard Mineral Co.*, 597.

MASTER AND SERVANT — Continued**§ 71.1. Workers' Compensation; Computation of Average Weekly Wage under Exceptional Circumstances**

Where a volunteer fireman suffered a compensable injury after he had been laid off from Roadway Express for eleven months, the Industrial Commission correctly calculated compensation based on plaintiff's earnings at Roadway Express. *Brown v. Walnut Cove Vol. Fire Dept.*, 409.

§ 94.2. Workers' Compensation; Judgment of Commission

Expert testimony was not required for the Industrial Commission to find that plaintiff still suffers from temporary total disability from a back injury. *Perkins v. Broughton Hospital*, 275.

§ 97.1. Workers' Compensation; Appeal and Review of Award; Remand

A matter was remanded to the Industrial Commission where the record did not show the legal status of salary continuation payments made by plaintiff's employer and deducted from the period of compensation. *Allen v. Standard Mineral Co.*, 597.

An order was remanded to the Industrial Commission where the Commission made no finding as to whether plaintiff's exposure to cotton dust significantly contributed to or was a significant causal factor in his chronic obstructive lung disease. *Adkins v. Fieldcrest Mills*, 621.

§ 99. Workers' Compensation Proceedings; Costs and Attorneys' Fees

The Industrial Commission had authority under G.S. 97-88 to award an attorney's fee to plaintiff in a workers' compensation case upon the withdrawal of an appeal by the employer and its insurer from an award in favor of plaintiff. *Suggs v. Kelly Springfield Tire Co.*, 428.

The abandonment of defendant's appeal after it had been calendared for review was the equivalent of affirmance of the award for plaintiff within the meaning of G.S. 97-86.2, and the Commission had authority under the statute to grant plaintiff interest on the award for the period between entry and actual payment. *Ibid.*

§ 108. Right to Unemployment Compensation Generally

Claimant's application for unemployment benefits was not a certification that she was then "unemployed" and did not constitute the voluntary leaving of her job without good cause attributable to her employer so as to disqualify her from receiving such benefits. *Wright v. Bus Terminal Restaurant*, 395.

MORTGAGES AND DEEDS OF TRUST**§ 1.1. Equitable Liens**

A counterclaim by defaulting purchasers of land for the return of a down payment and other monies paid to the vendors did not give rise to an equitable lien. *Falcone v. Juda*, 790.

§ 15. Transfer of Property Mortgaged

The foreclosure of a subordinate deed of trust and the resulting conveyance by the trustee to a party other than the original borrower does not amount to a sale of the property by the borrower so as to constitute a default under a "due on sale" clause in the senior deed of trust. *In re Foreclosure of Ruepp*, 146.

MUNICIPAL CORPORATIONS

§ 2. Annexation

The City conducted a proper annexation hearing under G.S. 160A-49 despite petitioners' complaints that the mayor and council members were insufficiently attentive to the speakers. *The Little Red School House, Ltd. v. City of Greensboro*, 332.

The City did not act arbitrarily, capriciously, or in an unreasonable manner in annexing the petitioners' property. *Ibid.*

The statutes governing annexation do not violate the petitioners' constitutional right to equal protection and do not violate the local act prohibition of the North Carolina Constitution. *Ibid.*

The annexation statute, as enacted and as applied by the City of Greensboro, was not a revenue bill required to be read three times in each house of the General Assembly. *Ibid.*

The annexation statutes under which the City acted were not taxation statutes, and therefore were not retroactive taxation statutes. *Ibid.*

§ 2.2. Annexation; Requirements of Use and Size of Tracts

Although the area sought to be annexed was broken into three subareas for determining whether the area was urban or connected urban areas, there is no authority requiring a precise description of the subareas, the Services Report contained a map showing the outlines of the subareas, and petitioners have shown no prejudice from their claimed ignorance of the boundaries of the subareas. *The Little Red School House, Ltd. v. City of Greensboro*, 332.

The court's findings that the City had complied with statutory requirements in determining population and degree of land subdivision were supported by plenary evidence. *Ibid.*

§ 2.3. Annexation; Compliance with Certain Statutory Requirements

There was much competent evidence to support the finding that the City substantially complied with the requirements of G.S. 160A-48(e) respecting the boundaries of the annexation area as related to the petitioners' property. *The Little Red School House, Ltd. v. City of Greensboro*, 332.

§ 2.6. Extension of Utilities to Annexed Territory

The report issued by the City in connection with its annexation of petitioners' property substantially complied with the requirements of G.S. 160A-47 concerning the provision of water and sewer services in annexed areas. *The Little Red School House, Ltd. v. City of Greensboro*, 332.

§ 4.1. Territorial Extent of Powers

The City of Charlotte acted within its power when it established a sanitary landfill in Cabarrus County and imposed a schedule of fees to be paid by all users of the landfill, and a Cabarrus County ordinance prohibiting the charging of fees to Cabarrus County residents for use of any landfill in Cabarrus County did not apply to the City of Charlotte. *Cabarrus County v. City of Charlotte*, 192.

§ 8.1. Standing to Challenge Ordinance

Summary judgment was properly granted for defendant Town in an action to recover monies paid into a parking fund, and the Town was not required to build parking spaces, because plaintiffs had been allowed to build a structure otherwise prohibited and had thus received the benefit of their contribution to the fund. *Goforth Properties, Inc. v. Town of Chapel Hill*, 771.

MUNICIPAL CORPORATIONS — Continued**§ 30. Power of Municipality to Zone Generally**

The time limit of 30 days from notice of decision constitutes a reasonable time within which a petition for certiorari to review a decision of a board of aldermen denying a conditional use permit must be filed. *White Oak Properties v. Town of Carrboro*, 360.

§ 31.1. Judicial Review of Zoning Ordinances; Standing to Sue

Plaintiff, the estranged wife of a month to month tenant whose lease in a trailer park had been lawfully terminated, had no interest in the trailer park property sufficient to allow her to challenge a zoning ordinance which indirectly forced the lessor to terminate the lease. *Wil-Hol Corp. v. Marshall*, 611.

NARCOTICS**§ 1.3. Elements and Essentials of Statutory Offenses**

Possession of a controlled substance is a lesser included offense of delivery but not of sale of the controlled substance. *S. v. Clark*, 55.

Where defendant was indicted for trafficking in cocaine by possession and delivery, there was no constitutional error in the denial of his motion to dismiss one of the offenses on the grounds that delivery includes possession. *S. v. Baize*, 521.

§ 2. Indictment

An indictment for conspiracy to sell or deliver cocaine was not fatally defective because it failed to state the name of the person to whom defendant agreed to sell cocaine. *S. v. McLamb*, 220.

An indictment which alleged possession with intent to sell or deliver cocaine, in the disjunctive, was incorrect, but defendant waived the defect by not moving to dismiss the indictment. *S. v. Hudson*, 389.

§ 3.1. Competency and Relevancy of Evidence Generally

In a prosecution for sale and delivery of cocaine and marijuana, the court properly sustained objections to questions about the reliability of an informant where the informant's only participation was to introduce an S.B.I. agent to defendant. *S. v. Gilchrist*, 180.

In a prosecution for sale and delivery of cocaine and marijuana, the court did not err by allowing an officer to testify that he had previously seen cocaine in a house where a drug transaction allegedly took place. *Ibid*.

In a prosecution for felonious possession of cocaine with intent to sell and deliver, admission of a device said to be used in smoking marijuana was erroneous; however, the error was made harmless by the court's granting a motion to strike. *S. v. Hudson*, 389.

§ 4. Sufficiency of Evidence

Evidence of the manner in which marijuana was packaged was sufficient to permit the jury to find that the marijuana was possessed for the purpose of sale and delivery. *S. v. Williams*, 136.

There was sufficient evidence to take a charge of conspiracy to traffic in cocaine to the jury. *S. v. Baize*, 521.

Where defendant moved to dismiss charges of possession and delivery of cocaine based on the State's failure to properly identify the cocaine, the court properly considered the evidence and denied the motion. *S. v. Baize*, 521.

NARCOTICS — Continued**§ 4.1. Cases where Evidence Was Insufficient**

Evidence that 5.03 grams of a heroin-quinine mixture was found in defendant's home was sufficient to convict defendant of trafficking in heroin. *S. v. Dorsey*, 435.

There was insufficient evidence to charge the jury on trafficking by possession of cocaine where two packages of cocaine were involved, each weighing less than 28 grams, and there was no evidence that defendant ever had possession of the package held by an accomplice. *S. v. Baize*, 521.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient to support an inference that defendant had constructive possession of marijuana plants growing near defendant's house. *S. v. Roten*, 203.

The State's evidence was sufficient to establish that defendant was in constructive possession of heroin, cocaine and marijuana found either in defendant's bedroom or in a sitting room of his home. *S. v. Dorsey*, 435.

§ 4.6. Instructions as to Possession

The trial court's instructions on constructive possession of marijuana were proper. *S. v. Clark*, 55.

§ 5. Verdict

A verdict finding defendant guilty of "selling or delivering marijuana" was inherently ambiguous. *S. v. Clark*, 55; *S. v. Hudson*, 389.

Verdicts in the disjunctive finding defendant guilty of possession of cocaine with intent "to sell or deliver" and the "sale or delivery" of cocaine were inherently ambiguous. *S. v. McLamb*, 220.

A verdict finding defendant "guilty of possessing marijuana" was insufficient to support a sentence for the felony of possession of more than an ounce of marijuana. *S. v. Dorsey*, 435.

NEGLIGENCE**§ 53.8. Duty of Care Owed to Invitee by Proprietors**

Plaintiff could properly bring an action against the owner of a convenience store for injuries sustained during a robbery at the store. *Sawyer v. Carter*, 556.

§ 56. Competency and Relevancy of Evidence in Actions by Invitees

Evidence pertaining to the foreseeability of a criminal attack on a store invitee will not be limited to prior crimes occurring on the premises. *Sawyer v. Carter*, 556.

§ 57.11. Actions by Invitees; Cases Involving Other Injuries where Evidence is Insufficient

In an action against the owner of a convenience store to recover for injuries received when plaintiff invitee was shot by a robber at the store, plaintiff's forecast of evidence was insufficient to raise a triable issue concerning the foreseeability of the robbery. *Sawyer v. Carter*, 556.

PARENT AND CHILD**§ 1.6. Sufficiency of Evidence to Terminate Parental Rights**

In an action for adoption based on willful abandonment, summary judgment should not have been granted because the forecast of evidence raised a genuine

PARENT AND CHILD – Continued

issue of material fact as to whether respondent's lack of contact with her child was willful. *In re Morgan*, 614.

§ 2.2. Child Abuse

The State's evidence was insufficient to support defendant's conviction of felonious child abuse. *S. v. Reber*, 256.

PAYMENT**§ 4. Burden of Proof**

The burden is upon the party contending payment to plead and prove payment. *Isenhour v. Icenhour*, 762.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS**§ 11.1. Malpractice; Standards as Determined by Particular Circumstances or Locality**

Plaintiffs' medical witnesses were qualified to testify in a nursing malpractice case despite their unfamiliarity with community standards for nursing care in Lumberton because they testified that the standard of care at issue was the same nationally. *Haney v. Alexander*, 731.

§ 11.2. Malpractice; Cure not Guaranteed

Plaintiffs' action for wrongful pregnancy was not a suit upon a guaranteed result because plaintiffs alleged that defendant totally failed to perform his promise rather than that he guaranteed his performance to yield a specific result. *Jackson v. Bumgardner*, 107.

§ 12.1. Malpractice Actions

Wrongful pregnancy is a cause of action recognized in North Carolina and plaintiffs' claim should not have been dismissed for failure to state a cause of action. *Jackson v. Bumgardner*, 107.

§ 15.2. Malpractice; Who May Testify as Experts

The trial court properly allowed two doctors to give their opinions as expert witnesses as to whether defendant hospital's nurses violated the applicable standard of care. *Haney v. Alexander*, 731.

§ 17. Sufficiency of Evidence of Malpractice; Departing from Approved Methods or Standard of Care

Plaintiffs' evidence was sufficient to create an issue of proximate cause for the jury where plaintiffs' experts testified that defendant's nurses were negligent. *Haney v. Alexander*, 731.

§ 17.1. Sufficiency of Evidence of Malpractice; Failure to Inform Patient of Risks

A child born with Down's Syndrome may maintain a "wrongful life" action against health care providers based on allegations that defendants negligently failed to inform the child's parents with respect to amniocentesis and the availability of genetic counseling, and the parents of the child have a legally cognizable claim against defendant health care providers for "wrongful birth" of the child. *Azzolino v. Dingfelder*, 289.

A cause of action may not be maintained by the minor siblings of a "wrongfully born" child for damages allegedly suffered by them as a result of the wrongful birth. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS — Continued

Plaintiffs' evidence in a wrongful birth action was insufficient to show that negligence by defendant family nurse practitioner in her advice concerning amniocentesis was a proximate cause of their damages. *Ibid*.

Plaintiffs' evidence was sufficient for the jury in an action against defendant obstetrician-gynecologist for the wrongful birth of their child with Down's Syndrome. *Ibid*.

§ 21. Damages in Malpractice Actions

A father shares a mother's right to seek damages for negligent wrongful conception or pregnancy. *Jackson v. Bumgardner*, 107.

Although the question of damages for wrongful pregnancy was not presented or reached, three views were noted. *Ibid*.

Plaintiffs' complaint in actions for wrongful life and wrongful birth failed to state a claim for punitive damages. *Azzolino v. Dingfelder*, 289.

PLEADINGS

§ 37.1. Necessity for Proof

An excess insurer was precluded on appeal from contending that the insured had not satisfied the condition that it maintain \$300,000 of primary coverage because of a \$50,000 deductible by admissions and allegations in its answer, stipulations, the failure to except to a finding of fact in the final judgment, and its knowledge of the primary insurance policy. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

PRINCIPAL AND AGENT

§ 9. Liability of Principal for Torts of Agent

Defendant corporation was liable under the doctrine of *respondeat superior* for the negligence of defendant physician in the performance of his duties at a clinic operated by the corporate defendant. *Azzolino v. Dingfelder*, 289.

RAILROADS

§ 5.8. Crossing Accident; Sufficiency of Evidence of Contributory Negligence

In an action for negligence arising from a collision at a railroad crossing, summary judgment should not have been entered for defendant because it is not contributory negligence as a matter of law for a driver to fail to observe a train approaching from one direction while he continues looking in another direction until he can see around an obstruction. *Miller v. Davis*, 200.

REGISTRATION

§ 1. Necessity for Registration

An Assignment of Pier Rights was not binding on subsequent purchasers because defendants failed to record the instrument prior to plaintiffs' acquisition of the land. *Smith v. Watson*, 351.

Record title will not be defeated by a trustee's unrecorded promise to reconvey. *Johnson v. Brown*, 660.

REGISTRATION — Continued**§ 3. Registration as Notice**

Where defendants failed to record an Assignment of Pier Rights prior to plaintiffs' acquisition of the land, actual notice will not defeat the requirement of recordation. *Smith v. Watson*, 351.

ROBBERY**§ 3. Competency of Evidence**

A robbery victim's testimony that the gun used by defendant was "one that would kill me if I didn't do what he said" was admissible as an instantaneous conclusion of the mind. *S. v. Wallace*, 681.

§ 4.1. Variance between Indictment and Proof

There was no fatal variance between an armed robbery indictment charging that defendant stole money from "American Cleaners Corporation, a corporation doing business as Holiday Cleaners" and testimony by the victim that she worked for American Cleaning Corporation, Holiday Cleaners Division. *S. v. Wallace*, 681.

§ 4.3. Sufficiency of Evidence of Armed Robbery

The State's evidence was sufficient for the jury to find that a dangerous weapon or firearm was used in a robbery so as to support defendant's conviction of armed robbery. *S. v. Wallace*, 681.

§ 4.4. Sufficiency of Evidence of Attempted Armed Robbery

The evidence was sufficient to go to the jury and supports a verdict of guilty in a prosecution for attempted armed robbery. *S. v. Harris*, 141.

§ 4.7. Cases where Evidence Was Insufficient

The evidence was not sufficient to submit armed robbery or common law robbery to the jury where there was no evidence that defendant knew the victim would be robbed or that one of his companions was armed, and no evidence that he encouraged the crime or indicated that he was prepared to render assistance. *S. v. Ikard*, 283.

§ 5.4. Instructions on Lesser Included Offenses

In a prosecution for armed robbery, there was no error in the court's failure to instruct on common law robbery where defendant did not object before the jury retired and where the uncontradicted evidence showed the use of a dangerous weapon. *S. v. Washington*, 767.

RULES OF CIVIL PROCEDURE**§ 8.2. Answer**

The burden is upon the party contending payment to plead and prove payment. *Isenhour v. Icenhour*, 762.

A defense based upon waiver of rights by plaintiff is an affirmative defense which must be pled by defendants. *Isenhour v. Icenhour*, 762.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

The trial court did not abuse its discretion by not permitting defendants to amend their answer to assert the statute of limitations for personal property claims because the action, involving an Assignment of Pier Rights, was not an action to recover personal property. *Smith v. Watson*, 351.

RULES OF CIVIL PROCEDURE — Continued**§ 38. Jury Trial of Right**

Defendant waived his right to a jury trial on the issue of absolute divorce when he demanded a jury trial on absolute divorce on 9 February and the last pleading directed to that issue was his answer, filed 28 December. *Arney v. Arney*, 218.

§ 41.2. Voluntary Dismissal in Particular Cases

Defendant's filing of a voluntary dismissal without prejudice in a highway condemnation case when defendant's pleading contained no counterclaim, cross-claim or third-party claim constituted an acknowledgment that the amount of the Department of Transportation's deposit was adequate compensation for the land taken. *Dept. of Transportation v. Combs*, 372.

§ 52. Findings by Court Generally

An order terminating parental rights was signed without authority where the judge signing the order was not present at the hearing and the presiding judge was not disabled and did not make findings of fact. *In re Whisnant*, 439.

§ 52.1. Findings by Court; Particular Cases

The court did not comply with Rule 52(a)(1) where the findings of fact consisted of recapitulations of testimony and exhibits, and the conclusions consisted of statements that plaintiff failed to carry its burden of proof. *Chloride, Inc. v. Honeycutt*, 805.

§ 56. Summary Judgment

There was no abuse of discretion in the granting of summary judgment before discovery was complete. *Vaglio v. Town and Campus Int., Inc.*, 250.

The lessee of property did not have an interest in litigation against the estate of a deceased cotenant to recover a portion of the rents received from the property so as to raise an issue as to the credibility of the lessee which would preclude summary judgment based on his affidavit. *Isenhour v. Icenhour*, 762.

§ 56.5. Summary Judgment; Findings of Fact and Conclusions of Law

The trial judge did not err by continuing plaintiff's Rule 56(d) motion to set forth uncontroverted facts and ordering defendants to provide the court information as to which portions of each matter they contended were contested. *State ex rel. Edmisten v. Challenge, Inc.*, 575.

The court did not improperly reverse its ruling on plaintiff's motion to state uncontroverted facts after continuing the motion and receiving defendants' response to an order for more information. *Ibid.*

The evidence was sufficient to support the granting of plaintiff's motion to state uncontroverted facts and motion for summary judgment. *Ibid.*

§ 56.7. Summary Judgment; Appeal

The entry of summary judgment for one of several defendants was an interlocutory order from which plaintiff could have appealed immediately, but she was not required to do so. *Ingle v. Allen*, 20.

§ 60. Relief from Judgment or Order

Trial courts are required to make findings of fact when denying Rule 60(b) motions if findings are requested, but are not required to do so when findings are not requested. *Vaglio v. Town and Campus Int., Inc.*, 250.

RULES OF CIVIL PROCEDURE – Continued**§ 60.2. Grounds for Relief from Judgment or Order**

Defendant's motion to set aside a judgment for mistake and excusable neglect should have been granted where defendant never received a trial calendar and where the civil calendar was not published and distributed in a timely fashion. *Callaway v. Freeman*, 451.

There was sufficient evidence for the court to deny plaintiff's Rule 60(b)(3) motion for relief from judgment, based on the misrepresentation of a contract, where the court examined the document and ruled as a matter of law that no contract existed. *Vaglio v. Town and Campus Int., Inc.*, 250.

There was no abuse of discretion in the denial of plaintiff's motion for relief based on mistake, inadvertence, surprise, or excusable neglect in the failure of plaintiff's counsel to submit affidavits and other evidence. *Ibid.*

The court did not abuse its discretion in denying plaintiff's Rule 60(b)(6) motion for relief based on the failure of the court or counsel to raise the issue of whether defendant had procured a ready, willing, and able buyer. *Ibid.*

There was no abuse of discretion in the denial of plaintiff's motion to vacate partial summary judgment for new evidence because the new evidence was merely cumulative and there was no showing that it could not have been discovered in time for the original hearing. *Akzona, Inc. v. Am. Credit Indem. Co.*, 498.

Rule 60(b)(6) grants relief for any reason other than those contained in Rule 60(b)(1)-(5), and a motion properly within the scope of Rule 60(b)(2) will be considered under that rule. *Ibid.*

§ 70. Judgment for Specific Acts

The trial court had authority under Rule 70 to order defendants to pay costs associated with the seizure of their property for public sale after their default under a consent judgment notwithstanding defendants paid the entire amount required by the consent judgment after the seizure of their property began and no public sale was ever conducted. *Coastal Production Credit v. Goodson Farms*, 421.

SALES**§ 5.1. Particular Express Warranties**

Defendant jeweler did not expressly warrant the value of a bracelet sold to plaintiff when he proceeded with the transaction after plaintiff stated, "If I have \$2,000.00 worth of jewelry, let's wrap it up," or when he gave plaintiff a written appraisal of the bracelet for insurance purposes. *Hall v. Kemp Jewelry*, 101.

§ 6.4. Warranties in Sale of House by Builder-Vendor

In an action for breach of warranty and unfair and deceptive trade practices arising from drainage problems around a newly built house, defendant was bound by a section of the contract labeled "Non-Warrantable Items." *Coble v. Richardson Corp.*, 511.

Defendant was bound by its construction warranty because the warranty did not indicate that a defect must be noted on a "walk-through" form for a buyer to preserve rights or that the form is the exclusive means of notifying defendant of problems arising under the warranty. *Ibid.*

SCHOOLS

§ 3. Creation of School Districts

A local act which provided a means whereby a certain area of Robeson County could be de-annexed from the Lumberton City Administrative Unit and returned to the Robeson County Administrative Unit by joint action of the city and county boards of education did not violate the constitutional prohibition against local acts establishing or changing lines of school districts. *Floyd v. Lumberton Bd. of Education*, 670.

§ 10. Assignment of Pupils

It was permissible to assess a tuition against residents of a county administrative unit who attended schools in the city administrative unit. *Floyd v. Lumberton Bd. of Education*, 670.

§ 11. Liability for Torts

Plaintiff's allegations of defamation, malicious interference with contract rights, and termination of employment without due process were properly dismissed as to school board members where defendant failed to allege any personal involvement by board members in the defamation or involvement in the termination as individuals. *Miller v. Henderson*, 366.

§ 13.1. Re-election of Teachers

An arbitrary or capricious recommendation by a school superintendent or principal does not provide a board of education a valid basis for refusing to rehire a non-tenured teacher. *Abell v. Nash County Bd. of Education*, 48.

Summary judgment was improperly entered for defendant school board in an action by two probationary teachers seeking reinstatement to their teaching positions. *Ibid.*

SEALS

§ 1. Generally

The ten-year statute of limitations applicable to actions on sealed instruments applied where the word "seal" appeared in brackets next to the signatures of the parties. *Biggers v. Evangelist*, 35.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

Defendant abandoned any expectation of privacy in his jacket when he dropped it in a public place while fleeing from officers, and marijuana found during a search of the jacket was admissible without any finding as to probable cause for the search. *S. v. Williams*, 136.

In a prosecution for trafficking in marijuana, evidence that an officer detected the odor of marijuana coming from a mobile home was not tainted by the fact that the officer was in the woods near the home when he detected the odor. *S. v. Ford*, 748.

§ 7. Search and Seizure Incident to Arrest

A search of a suspect before formal arrest is incident to the arrest when probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish probable cause. *S. v. Gilliam*, 83.

SEARCHES AND SEIZURES — Continued**§ 8. Search Incident to Warrantless Arrest**

There was no error from the admission of evidence seized from defendant's person after he was detained by a private citizen because the officer who arrested defendant had probable cause for the arrest and the search was therefore incident to a lawful arrest. *S. v. Gilliam*, 83.

§ 15. Standing to Challenge Lawfulness of Search Generally

A defendant in a prosecution for trafficking in marijuana did not have standing to challenge the sufficiency of a warrant to search a mobile home when he was not legitimately on the premises at the time of the search and did not assert a possessory interest in the premises. *S. v. Ford*, 748.

§ 23. Application for Warrant; Sufficiency of Showing of Probable Cause

In a prosecution for trafficking in marijuana, evidence of unusual traffic and an odor of marijuana constituted probable cause to believe that marijuana might be found in the mobile home. *S. v. Ford*, 748.

§ 43. Motions to Suppress Evidence

Where defendant filed a pretrial motion to suppress without the required affidavit, then moved to amend the motion and file the affidavit during trial, the motion to suppress was not in proper form and the motion to amend was not timely. *S. v. Harris*, 141.

By failing to make a motion to suppress seized evidence before trial, defendant waived his right to contest the admissibility of the evidence at trial on constitutional grounds. *S. v. Roten*, 203.

§ 45. Necessity for Hearing on Motion to Suppress

The trial court properly denied defendant's motion to suppress without a *voir dire* hearing where defendant did not contend that he did not have a reasonable opportunity to make the motion before trial, that the State did not give sufficient notice of its intention to use the evidence, or that additional facts had been discovered. *S. v. Harris*, 141.

STATUTES**§ 2.7. Constitutional Prohibition against Enactment of Local Acts Relating to Schools**

A local act which abrogated a former act levying a special school supplemental tax in effect repealed a local act, not the general law, and was constitutional. *Floyd v. Lumberton Bd. of Education*, 670.

TAXATION**§ 25.11. Ad Valorem Taxes; Proceedings; Judicial Redress**

Taxpayers who did not perfect an appeal from the Property Tax Commission to the Court of Appeals may not seek judicial review of the Commission's decision in superior court. *Johnston v. Gaston County*, 707.

A complaint filed in superior court challenging a property tax assessment was properly dismissed where it lacked allegations that the taxpayer had paid taxes due and filed a statement of valid defense and a request for release or refund of the tax. *Ibid.*

TENANTS IN COMMON

§ 3. Mutual Rights and Liabilities

An Assignment of Pier Rights can either be considered an agreement between tenants in common giving one tenant in common the right to exclusive use of part of the property or a covenant running with the land. *Smith v. Watson*, 351.

By virtue of their cotenancy with defendants' predecessor, plaintiffs are entitled to an accounting for rents received from the property by defendants' predecessor. *Isenhour v. Icenhour*, 762.

§ 5. Conveyance of Property

The court properly granted summary judgment for one tenant in common arising from the conveyance by the other of a one-half undivided interest in one of two contiguous tracts with an easement over the adjoining tract. *LDDC, Inc. v. Pressley*, 431.

TRUSTS

§ 13.2. Creation of Resulting Trusts; Parol Agreement to Purchase or Accept Title for Benefit of Another

Plaintiff could not engraft an express parol trust on deeds to his wife which were intended to pass title. *Boyce v. Meade*, 592.

The trial court could not exercise jurisdiction under former G.S. 36-39(a) to require successors in interest of plaintiff's wife to reconvey to plaintiff property which he allegedly conveyed to his wife upon a parol trust where refusal to perform the terms of the alleged trust occurred years after the statute was repealed. *Ibid*.

§ 16. Actions to Establish Resulting and Constructive Trusts; Pleadings

Plaintiffs could not rely on a parol trust to defeat title to real property where allegations of fraud, deceit, and undue influence were made in the original complaint but not in an amended complaint. *Johnson v. Brown*, 660.

§ 19. Sufficiency of Evidence in Action to Establish Constructive Trust

Plaintiff's evidence was insufficient for the imposition of a constructive trust on entirety property and solely owned property conveyed by plaintiff to his wife because of potential liability from a lawsuit pending against him. *Boyce v. Meade*, 592.

Summary judgment should not have been granted for plaintiff beneficiary where she had released the right to demand reconveyance of real property by the trustee. *Johnson v. Brown*, 660.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Defendant jeweler's oral representations and written appraisal of the value of a bracelet sold to plaintiff did not constitute an unfair trade practice. *Hall v. Kemp Jewelry*, 101.

The trial court did not err by denying defendants' motion for treble damages and attorney's fees because neither the pleadings nor the evidence suggested that defendants were proceeding on an unfair or deceptive trade practice claim and there was no specific finding of willfulness or unwarranted refusal to settle. *NCNB v. Carter*, 118.

UNFAIR COMPETITION — Continued

In an action arising from a drainage problem in a newly built house, the trial court erred by finding that defendant's failure to correct the problem constituted an unfair trade practice. *Coble v. Richardson Corp.*, 511.

UNIFORM COMMERCIAL CODE**§ 11. Express Warranties**

Defendant jeweler did not expressly warrant the value of a bracelet sold to plaintiff when he proceeded with the transaction after plaintiff stated, "If I have \$2,000.00 worth of jewelry, let's wrap it up," or when he gave plaintiff a written appraisal of the bracelet for insurance purposes. *Hall v. Kemp Jewelry*, 101.

§ 18. Performance

In an action on a contract for the sale of goods in which plaintiff agreed to purchase machinery from defendant, paid a deposit and agreed to pay the balance before delivery with the payment and delivery date unspecified, plaintiff breached the contract by responding to defendant's request for payment with a refusal to pay and a demand for the return of the deposit. *Southern Utilities, Inc. v. Mandel Machinery Corp.*, 188.

§ 28. Commercial Paper; Definitions and Execution

The incorporation of two deeds of trust and a security agreement into a note by reference did not make the promise to pay uncertain or conditional so as to impair the negotiability of the note. *International Minerals v. Matthews*, 209.

§ 32. Commercial Paper; Liability of Parties

The statute providing that no consideration is necessary for a negotiable instrument given in payment of or as security for an antecedent obligation applies to both obligors and accommodation makers. *International Minerals v. Matthews*, 209.

VENDOR AND PURCHASER**§ 1. Requisites and Validity of Contracts to Convey**

A contract for the sale of realty did not merge into the deed. *Biggers v. Evangelist*, 35.

§ 3. Description of Land

Sellers were bound by their attorney's parol agreement, made within the scope of his authority, as to the description of the property to be placed in the deed conveying the property to the buyers even though the parol agreement modified the written agreement between the parties. *Biggers v. Evangelist*, 35.

§ 4. Title and Restrictions

A clause in a contract for the sale of realty gave the sellers the power expressly to reserve rights-of-way in two roads but did not invalidate the sellers' conveyance in the deed of their easements in the two roads or entitle the sellers to seek rights-of-way in the roads after the conveyance. *Biggers v. Evangelist*, 35.

An issue of title was not relevant to plaintiff vendors' right to cancellation of a notice of purchasers' interest upon default by defendant purchasers. *Falcone v. Juda*, 790.

VENDOR AND PURCHASER — Continued**§ 5.1. Matters Precluding Specific Performance**

The evidence presented a jury question as to mutual mistake of fact in an action for specific performance of a contract for the sale of land. *Graham v. Morrison*, 743.

VENUE**§ 1. Definition and Nature of Venue**

Performance bonds providing that plaintiff construction company assented to being sued in Mecklenburg County on its contract and for claims of subcontractors, laborers, or materialmen did not provide that Mecklenburg was the only county in which plaintiff could bring an action for breach of contract against a subcontractor. *Mid-South Const. Co. v. Wilson*, 445.

Where a general contractor has brought a claim against a subcontractor in Harnett County on a construction project in Mecklenburg County, statutory requirements that the subcontractor assert its claim against the contractor as a counterclaim and that the subcontractor bring its action in Mecklenburg County do not mean that the contractor's action must be brought in Mecklenburg County. *Ibid.*

WAIVER**§ 3. Pleadings**

A defense based upon waiver of rights by plaintiff is an affirmative defense which must be pled by defendants. *Isenhour v. Icenhour*, 762.

WILLS**§ 24. Caveat; Verdict**

There was an irreconcilable repugnance in the jury's verdict in a caveat proceeding where the jury answered affirmatively an issue as to whether the paper writing purported to be a holographic will was executed according to the requirements of the law but answered negatively a second issue as to whether the paper writing was the last will and testament of decedent. *In re Will of Leonard*, 714.

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